

No. 10938

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE FRANKLIN FIRE INSURANCE CO.
OF PHILADELPHIA, PENNSYLVANIA,
a Corporation,

Appellant,

vs.

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees.

SUPPLEMENTAL

Transcript of Record
In Two Volumes
VOLUME II
Pages 137 to 353

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

JAN 18 1945

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PROCEEDINGS AT HEARING ON MOTION FOR SUMMARY JUDGMENT

Be It Remembered, that heretofore and on to-wit October 31, 1944, at the hour of 10:00 a.m., the above entitled matter came on for Hearing on Motion for Summary Judgment before the Hon. John C. Bowen, one of the Judges of said Court;

Plaintiffs appearing by C. E. H. Maloy, Esq., their attorneys and counsel;

Defendant appearing by Lane Summers, Esq., Matthew Stafford, Esq., and Stanley A. Taylor, Esq., (Messrs. Hayden, Merritt, Summers & Stafford), its attorneys and counsel.

Whereupon, the following proceedings were had:
Mr. Maloy: I will call Hans Mikelsen.

HANS MIKELSEN,

one of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Will you please state your name and residence? A. Hans Meikelsen.

Q. You can remain seated, Mr. Mikelsen.

A. Hans Mikelsen. South Colby, Washington.

Q. Where is South Colby?

A. It is across the Sound here.

Q. Across the Sound? A. Yes.

Q. How long have you lived there?

A. Oh, for about 20 years.

(Testimony of Hans Mikelsen.)

Q. During what period of time, what has been your business, Mr. Mikelsen? A. Fishing.

Q. What kind of fishing have you been engaged in? A. Purse seining.

Q. Have you been engaged in any other kind of fishing than purse seining?

A. Halibut fishing.

Q. Any other kind of fishing? A. No.

Q. Have you been engaged in any other business than the fishing business during this last 20 years?

[21]

A. No.

Q. Have you been the owner of a fish boat or fish boats during such period of time? A. No.

Q. You are acquainted with the Plaintiff Oluf B. Hanney? A. Yes.

Q. And, of course, Paul Vohl? A. Yes.

Q. State whether or not you men are partners in a vessel known as the Trade Wind?

A. Yes, sir.

Q. When was the Trade Wind built?

A. '41.

Q. Would you mind telling us as to the nature of your interest in that vessel?

A. I bought in with Oluf Hanney and Paul Vohl when they laid the keel on the boat.

Q. When was that, Mr. Mikelsen?

A. That were in August in '41.

Q. August '41? A. Yes.

Q. Where was that vessel then being built?

Mr. Stafford: Just a moment, if your Honor

(Testimony of Hans Mikelsen.)

please. I object to that question on the ground that it is not the best evidence. There is written evidence of where that vessel was being built.

The Court: Is this preliminary?

Mr. Maloy: Yes, your Honor. Most assuredly a man can testify that he owns something.

Mr. Stafford: I have not objected to his testifying [22] that he owns something.

Mr. Maloy: That is what I am asking him.

The Court: The objection was made to his testifying where it was being built, and I think that objection should be overruled.

Q. (Mr. Maloy) Will you state where the vessel was being built?

A. At Tacoma, Washington.

Q. When did construction of that vessel commence?

Mr. Stafford: The same objection, if your Honor please.

The Court: The objection is overruled.

A. It was about August. I can't exactly remember the date, but it was in August in '41.

Q. At or about the time that you commenced to have that vessel built, say, in August, 1941, did you have any negotiations or business with Chester J. Chastek & Company with regard to securing some insurance? A. Yes.

Q. When was that, Mr. Mikelsen?

The Court: Was that by written communication?

Mr. Maloy: No, your Honor, I think not.

(Testimony of Hans Mikelsen.)

The Court: Very well. You may state if you know, but do not refer to the contents of a written document, nor to any uncertainty in your own mind. If you know the answer, you can state it.

The Witness: August 20.

Q. (Mr. Maloy) August 20?

A. Yes.

Q. Did you see Mr. Wheelock? [23]

A. Yes.

Q. Were you alone, or was somebody else with you? A. Mr. Hanney was with me.

Q. Where did you see Mr. Wheelock?

A. Up to his office.

Q. Where was that?

A. 3 or 4 blocks up here.

Q. Do you know the name of the building?

A. Yes. Insurance Building, I think.

Q. In the Insurance Building?

A. Yes.

Q. Just tell the jury what took place at his office in the presence of you and Mr. Hanney, with Mr. Wheelock, on this occasion.

Mr. Stafford: I would like at this time—I think it would save time in the trial of this case—to state my objection to this testimony rather fully, and perhaps—

The Court: (Interrupting) You can state your objection without argument, and at some time, if it is vital to argue the matter, I will give you an opportunity in the absence of the jury.

(Testimony of Hans Mikelsen.)

Mr. Stafford: I think that it is just exactly that. I think it is that pressing.

The Court: Very well. The jury will temporarily retire.

(Whereupon, the jury retired to the jury room, and the following proceedings were had in their absence and without their hearing.)

Mr. Stafford: Now, if your Honor please, that [24] question can clearly have no purpose other than to have admitted in evidence here either circumstances or conversations pertaining to this policy, which are, of course, extraneous and extrinsic to the policy itself; and to that sort of evidence at this time the defendant objects, because, first, of course, I wish to reiterate the position of the defendant that the construction contract of May 14, 1941, and the policy, leave no ambiguity as to the subject matter of this insurance, and therefore leave no room for and render improper the reception of parol evidence to explain it.

We wish also at this time to make the further objection that this court cannot admit parol evidence without first having before it the contract which the parol evidence is offered to explain. It is perhaps the position of counsel for plaintiffs that the policy is already in evidence here by reason of the fact that its execution is admitted. However, he has stated to the jury that the policy would be offered in evidence. It is perfectly clear that the construction contract of May 14, 1941, is not presently in evidence.

(Testimony of Hans Mikelsen.)

Now, it is our position that under the parol evidence rule, before your Honor can permit parol evidence of the type called for by the question which the reporter just read, to go to the jury, you must first decide as a preliminary matter the question of law, whether or not the contract is ambiguous, in what respect it is ambiguous; and then, having determined that it is ambiguous and in what respect it is ambiguous, only then can the Court rule on the admissibility of testimony of this [25] type.

The Court: Did you wish to give the Court the benefit of any specific authority to that effect?

Mr. Stafford: Williston on Evidence is just replete with it, your Honor. I could read for the rest of the afternoon from him on it.

The Court: Could you read one or two good passages?

Mr. Stafford: I intended to bring the volume up. It was so long that I didn't copy it into the brief, and for that reason I can't comply with your Honor's suggestion; but that it is the law I doubt very seriously that Counsel will question, that the Court must as a matter of law pass first on the question of the existence of the ambiguity and its extent, in order to admit parol evidence; and then only can parol—the third part of my objection which I wish to make at this time is that parol evidence, even though the Court may hold that this contract is ambiguous, even then testimony of this type can be admitted only for the purpose of ex-

(Testimony of Hans Mikelsen.)

plaining the intent expressed, and not of extending the coverage to something that is not expressed.

Those are the three portions of my objection, although the third is probably not called for at this time. The first two are called for.

It is my position that until Counsel puts in evidence the entire contract, which, of course, we maintain consisted of the policy and construction contract, he cannot offer any parol evidence to explain them, because the Court can't determine what if any ambiguity there is.

The Court: Mr. Maloy, did you wish to respond? [26]

Mr. Maloy: Well, your Honor,——

The Court: Counsel may remain at their stations during the course of the trial.

Mr. Maloy: Well, your Honor, in the first place, I think your Honor has held this morning that the contract is ambiguous or obscure and of doubtful meaning, in your ruling on the motion for summary judgment; and I understood, and I do understand, that your ruling was based on what the court of appeals held, which was that it was obscure and ambiguous.

So the Court of Appeals has already held that it is ambiguous; and if they have held it is ambiguous, then they said that we are entitled to introduce evidence of the surrounding circumstances to determine the intention of the parties.

Now, I have lots of authority, and I have Jones

(Testimony of Hans Mikelsen.)

on Evidence right here now, where the rule is laid down; and I read from *Corpus Juris* this morning where the rule was laid down as to the type of evidence that was admissible to determine the intention of the parties in a case where the contract or the policy of insurance, the contract of insurance, whatever we want to call it, is ambiguous.

The Court: I understood him to make two points. The first was that you ought to have the contract in evidence.

Mr. Maloy: Oh, I will put the contract in evidence. I will put the insurance policy in evidence, your Honor, of course.

The Court: And the second point—— [27]

Mr. Maloy: (Interposing) I am leading up to that.

The Court: And the second point, as I understood it, was that you ought to specify the particular ambiguity in question.

Mr. Maloy: Well, of course, the particular ambiguity is in the language of the policy, and particularly that portion of it where it says "all materials belonging and destined for the boat, Hull No. 20."

Now, there is where the Circuit Court held that that language in appropriate circumstances would cover the risk here.

The Court: It being the Plaintiffs' contention that that means what?

Mr. Maloy: That it means that the policy is

(Testimony of Hans Mikelsen.)

ambiguous. Oh, you mean as to the word "destined"?

The Court: Yes.

Mr. Maloy: Well, our position is just this, your Honor, in connection with that language. The policy says "on hull, tackle, apparel"—I won't read all of it—"machinery, appurtenances and so forth," and then it says, "including plans, patterns, molds and so forth, boats, and other furniture and fixtures, and all material belonging and destined for Halibut Boat Hull No. 20."

Now, the Circuit Court held, as I recall the language, that that was a pretty extensive word. It is the theory of the Plaintiffs or the contention of the Plaintiffs and the position of the Plaintiffs that that language is broad enough and does include this particular property which was purchased for this boat and which belonged and was destined for it. [28]

Now, there is the language that is ambiguous. The Circuit Court said that was ambiguous.

Now, we want to go into the surrounding facts and circumstances so as to show the knowledge of the insurer that this property was located in this locker here in Seattle, and that the plaintiffs wanted it insured, and they were told by the insurance agent that that language covered it.

Now, that is admissible under all the authorities, and—

The Court: (Interrupting) I don't believe you need to go any farther unless you wish the record

(Testimony of Hans Mikelsen.)

to show the authorities that you rely upon for that point.

Mr. Maloy: Well, I have *Corpus Juris* here which I read to your Honor this morning. I have Volume 3 of *Jones on Evidence* where the matter is referred to at length and along the same lines.

The Court: As I understand you, you are willing to meet the objection that the contract itself must be in evidence?

Mr. Maloy: Oh, I am going to introduce—I will introduce it right now.

The Court: All right.

Mr. Stafford: That doesn't complete that point. That only partially completes it. I will have no objection and agree to the admission of the policy in evidence.

The Court: It may be done now, the same as if the jury were present?

Mr. Stafford: It may be.

The Court: And have the same effect in the trial [29] of this case? Is that agreeable?

Mr. Stafford: That is agreeable.

The Court: The policy may now be marked plaintiffs' Exhibit 1.

Mr. Stafford: I should like an opportunity, of course, to examine it.

(Whereupon, Policy of Insurance issued by The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, dated August 20, 1941, was marked Plaintiffs' Exhibit No. 1 for identification.)

(Testimony of Hans Mikelsen.)

Mr. Stafford: Now, if your Honor please, the policy having been—

The Court: (Interrupting) Now I will give it to you and let you look at it.

Mr. Stafford: I am sorry. The policy having been admitted in evidence—

The Court: I haven't ruled yet.

Mr. Stafford: Oh, I thought you had. That is right, I wanted to examine it, yes.

The Court: Plaintiffs' Exhibit No. 1 is now admitted.

(Whereupon, Plaintiffs' Exhibit No. 1 for identification was admitted in evidence.)

(Set out in full as exhibit A, page 10.)

The Court: Did you wish to make a further statement?

Mr. Stafford: Yes, I did, if your Honor please. Now, the insurance policy in question now being in evidence in this case, the Defendant wishes to point out that the Court is not yet in a position to pass upon the [30] preliminary legal question of the existence of an ambiguity here because the entire contract of the parties is not yet before the Court. By that I mean, of course, that the policy is incomplete standing alone, and can be completed only by the reception in evidence in this case of the construction contract of May 14, 1941, to which the policy refers, and without which the policy cannot, in our opinion, be properly interpreted.

The Court: Do you wish it marked for identification at this time and submitted to opposing coun-

(Testimony of Hans Mikelsen.)

sel to see if he has any objection to its admission in evidence at this time?

Mr. Stafford: Did you bring the original contract with you, Mr. Maloy?

Mr. Maloy: Yes, I think so; but I do not want to be understood as offering it.

The Court: I understand that that is your position. This will be marked Defendant's Exhibit A-1.

(Whereupon, Agreement, dated May 14, 1941, between Peter Petersen and Oluf B. Hanney, was marked Defendant's Exhibit A-1 for identification.)

The Court: Is there any question about the authenticity of it?

Mr. Maloy: No, I think not, your Honor.

The Court: Then, Mr. Stafford, if you so desire, you can state for the record the identity of it, which I think is admitted by—you can state the identity of Defendant's Exhibit A-1 which you think is admitted by [31] the Plaintiffs. I mean, state the identifying characteristics of the document which you think are admitted by the Plaintiffs.

Mr. Maloy: I don't want any misunderstanding. The Plaintiffs are not going to be held responsible for this agreement, or they are not offering it; and, of course, if offered by the Defendant, would object to its being introduced in evidence at this time or at any other time.

The Court: Will you state what the instrument is? That is all the Court meant to say.

(Testimony of Hans Mikelsen.)

Mr. Stafford: By the construction contract of May 14, 1941, to which I referred in my remarks of a few moments ago, I mean the document now marked by the Clerk of this Court as Defendant's Exhibit A-1, consisting of three and a half typewritten pages, entitled "Agreement," and stating its date to be May 14, 1941, and the parties to it to be Peter Petersen and Oluf B. Hanney, and bearing the signatures Peter Petersen, First Party, O. B. Hanney, Second Party.

Is that sufficient?

The Court: Is it what is known as the construction contract in this case?

Mr. Stafford: Yes, if your Honor please. This is the document which has been produced by the Plaintiffs in response to a demand by me on behalf of the Defendant to produce the original construction contract at this trial.

The Court: Is there any objection that the document is not what it purports to be?

Mr. Maloy: Oh, no. It is genuine, your Honor.

[32]

The Court: Your objection runs to its admissibility?

Mr. Maloy: Yes, your Honor; and I notice it has been marked as an exhibit. Now, I think it ought to be marked for identification.

The Court: It hasn't been received. It hasn't

(Testimony of Hans Mikelsen.)

been marked received. It is an identified exhibit. It has not been received in evidence.

Mr. Stafford: Now, to conclude my remarks, it is our position, as I have already stated, I believe, but I am not sure, that the Circuit Court of Appeals has said, and it is the law of this case, that there is an ambiguity in this policy when considered alone. It is our position that all ambiguity that exists here with respect to subject matter—and Counsel in his opening statement or in his statement here a few moments ago to the Court stated that the ambiguity was solely a question of what was the subject matter. It is our position that if this Defendant's Exhibit A-1 and Plaintiffs' Exhibit 1 are considered together, that there is no ambiguity; first, that they must be considered together because they are parts of the same transaction, because the policy is replete with references to Defendant's Exhibit A-1; and that being considered together, the policy is entirely free from ambiguity so as to make the reception of parol evidence unnecessary and improper.

Now, I should like, if your Honor please, to quote from Mr. Wigmore's work on evidence.

The Court: Mr. Stafford, this point has been covered thoroughly by briefs filed on the subject by both sides and argued at great length on prior occasions. [33]

Mr. Stafford: I don't intend to go over that ground. The point that I was about to make, your

(Testimony of Hans Mikelsen.)

Honor, I don't think has ever been made before, because it could only be made at a trial.

The Court: All right.

Mr. Stafford: And that is this: Wigmore, Section 2104, says that where a writing offer refers to another writing, the latter should also be put in—and, of course, it means in evidence—at the same time, provided the reference is such as to make it probable that the latter is requisite to a full understanding of the effect of the former; the same principle would apply to another writing, not expressly referred to, but necessary by the nature of the documents to a proper understanding of the one offered. Much, therefore, will depend upon the circumstances of each case and the character of each document, and no fixed rule can fairly be laid down. The trial court's discretion should control.

Now, if your Honor will recall, Mr. Maloy in his statement to the jury told about the construction contract, told about buying the performance bond, and told about buying the builder's risk insurance.

It is perfectly apparent that even in Mr. Maloy's mind those three documents are all part of a single transaction; that you cannot understand one without reference to the other.

That applies particularly to the builder's risk in the light of the construction contract.

Now, the point I am making is probably the same point that has been made before, but as to which I do [34] not intend to go back over all those elaborate arguments, but the point I am making is that

(Testimony of Hans Mikelsen.)

your Honor with this policy now in evidence is in no better position to pass upon a preliminary legal question of the existence of an ambiguity than he was before it was offered, and will not be in a proper position to do so until the other essential part of the transaction, namely, Defendant's Exhibit A-1, is also admitted in evidence.

The Court: What is the name of the case in 60 Wash. or 63 Wash.?

Mr. Maloy: Burbank vs.—I have it here.

The Court: It is the Burbank case. Do you recall the volume?

Mr. Maloy: 60 Wash. 253. I have it right here, your Honor.

The Court: No, I don't need to see it. I want to cite it as the basic authority in this State for sustaining the Plaintiffs' objection to the reception in evidence of the building contract as a necessary condition to admitting the insurance contract.

It may be that Wigmore has a view on this subject that supports the Defendant's contention here, that if the contract of insurance is to be received in evidence, there must along with it be received as a part of that very same contract, and in order to give the full and complete understanding of that insurance contract, also the building contract, the boat construction contract.

In the situation here as the matter is presented the Court is of the opinion that the Burbank case does not take that view contended for by Defendant, and that [35] in the situation here the Plaintiffs are

(Testimony of Hans Mikelsen.)

entitled to have received in evidence the insurance contract without having tacked upon that right the condition that also they must suffer to be received in evidence at this time the boat-building contract.

Mr. Stafford: For the purpose of the record, your Honor, may I cite two cases on this question?

The Court: I understood that the matter was submitted. You may for the purpose of the record cite the two cases.

Mr. Stafford: The two cases are a decision of our Ninth Circuit Court of Appeals, Metropolitan Life Insurance Company vs. Henderson, 92 F (2d) 891, and a decision of the Supreme Court of the State of Washington, 87 Wash. 237.

The Court: I assume, and as I recall from the briefs, there were other cases relied upon by Plaintiffs in this connection, but I will not stop to cite them now.

This ruling of the Court is without prejudice to the privilege of Defendant in its proper time in the course of the trial, should it be brought about in the proper way, to offer this boatbuilding contract as a part of its case in chief. I will pass upon that situation if and when it arises.

Mr. Stafford: Now, the only other thing I have to say, if your Honor please, you remember I suggested that a hearing now might save time during the trial. I would think it would be helpful to both the Court and Counsel if at this time it could be stipulated that the objection which I have just

(Testimony of Hans Mikelsen.)

made will not have to be restated [36] to similar testimony, but can be considered to go to all similar testimony.

However, I am perfectly willing to restate it each time if necessary.

Mr. Maloy: I don't care to make any stipulation, your Honor.

The Court: Just in each instance, state your objection for the record without argument. That is the only suggestion the Court will make.

Is there anything else that you think of? Any important issue in the matter or that is liable to be raised in the course of receiving the evidence that you would like to discuss in the absence of the jury?

If you can anticipate any such, I would think it would facilitate matters for you to bring up those questions now.

Mr. Stafford: There is one other thing, but I think your Honor has already anticipated it. I was going to suggest, in the absence of an offer of Defendant's Exhibit A-1 by the Plaintiffs, that Defendant be permitted to offer it at this time so that the entire matter would be before the Court. I will make that offer at this time.

The Court: You mean out of order as a part of your case in chief?

Mr. Stafford: That is right, but the Court has the right to take that out of order if the Court desires to do so, and I will make that offer at this time so that it will be before the Court.

(Testimony of Hans Mikelsen.)

The Court: The Court will entertain it as a part [37] of the Defendant's case in chief out of order, in order to accommodate the progress of the trial. Before ruling thereon, I will give Mr. Maloy for the Plaintiffs an opportunity to state his objection.

Mr. Maloy: I object to it as being incompetent, irrelevant and immaterial, and no part of the contract of insurance. The contract of insurance doesn't refer to it in any wise whatsoever. The contract of insurance was made three months or more later when they were discussing an entirely different matter than the building contract. I object to it either as a part of the Defendant's case in chief or part of the cross-examination of this witness or otherwise.

The Court: You offer it to prove or tend to prove what position or contention taken by the Defendant?

Mr. Stafford: Well, of course, the only answer I can make to that is that I offer it as a necessary part of the insurance policy; also as a document without which the insurance policy cannot be properly interpreted; also as a document which constitutes a part of the same transaction of which the insurance policy and the agreement evidenced by it was also a part.

The Court: And thereby to assist the Defendant in establishing the meaning of the policy as contended by the Defendant? Is that your position?

Mr. Stafford: Oh, yes, as contended for by the Defendant, but the assistance which I had hoped to

(Testimony of Hans Mikelsen.)
give by its introduction was primarily to the Court
rather than to the Defendant.

The Court: This is a trial on an issue of fact
before [38] fore the jury.

Mr. Stafford: Could I be heard one bit further
on this matter, because Mr. Maloy is already taking
positions which are hopelessly inconsistent.

The Court: I wish you would clarify your own
position before you argue. I would like to know
what it is you seek to prove by this document, De-
fendant's Exhibit A-1, which you now offer in
evidence.

Mr. Stafford: That is what I wanted to go into.

The Court: State it as briefly as possible, be-
cause I think I understand your position, and I
think my views on the matter are in harmony with
yours. It is a question of your advising the Court
definitely what purpose you have in offering this
document.

Mr. Stafford: First, in his opening statement to
the jury, and since, Mr. Maloy has stated that the
construction contract—he himself stated that to the
jury, I didn't—the construction contract was en-
tered into in May; but he said construction didn't
begin right away, the keel wasn't laid until August,
and therefore builder's risk insurance wasn't neces-
sary until August. That is his own statement.

Now, in his argument and in his objection to
the Court he says the construction contract is too
remote; and why does he say so?

(Testimony of Hans Mikelsen.)

The Court: You needn't bother to reargue what you have already said.

Mr. Stafford: All right. So much for that part.

Now, answering the other part of your Honor's question, I can best put it this way: The only portion of [39] this policy which requires interpretation, by Mr. Maloy's own statement, is what constitutes the subject matter of this policy. He says the language, such and such, belonging and destined for halibut boat Hull No. 20, building at Tacoma, Washington, or Brown's Point, is ambiguous in the light of the decision of the Circuit Court of Appeals that may be the law of the case, that that is ambiguous; but we want this construction contract to go in evidence in this case for a number of reasons, the principal one of which is that in our view this contract, together with the admissions of record by Plaintiffs in this case, which Mr. Summers read at length to you this morning, which I shouldn't go back over, clears up any possible ambiguity that the Circuit Court of Appeals could have found in the policy when they were considering it alone.

In other words, we take the position that the question which is now being presented to you is entirely different from the question which was being presented to the Circuit Court of Appeals.

Now, I would like to refer to one passage in this contract. I am reading from page 2 of Defendant's Exhibit A-1. (Reading)

"It is understood and agreed that the vessel

(Testimony of Hans Mikelsen.)

herein contemplated shall be known and designated as Hull No. 20 during its construction, and that the keel for the same"—

Well, the rest of it is immaterial to this discussion. The words I want to call particular attention to are those, that the vessel herein contemplated shall be known [40] as Hull No. 20 during its construction.

All right. We look at the policy and we find that we insured material belonging and destined for Hull No. 20.

Now, you can look in all the dictionaries and you will not find Hull No. 20; but you look in this construction contract and you find the complete unambiguous definition of the term Hull No. 20, an artificial symbol adopted by whom? Adopted by Mr. Hanney and Mr. Petersen as a designation of the vessel. What vessel? A vessel during the period of its construction.

Now, the law is—and I have cases in my trial brief that seem clearly to establish it, even though I don't believe any cases are necessary—that the parties to the contract are competent, and the courts have no power in the world to disturb their right to use any language and to attribute to any language they use any peculiar meaning they desire. They can put in a contract the word "mile" and they can define "mile" to mean "inch," and in the interpretation of that contract the word "mile" must mean "inch."

(Testimony of Hans Mikelsen.)

The Court: I wish you would take this occasion to advance your own position by saying what it is in the contract that will help you in your contention as to the construction of the insurance contract you seek to make.

Mr. Stafford: That is what I thought I was doing, your Honor, but I am sorry I am not making myself clear.

The Court: Well, it is buried in such extensive argument that I lost it, I suppose. [41]

Mr. Stafford: Well, in a single sentence, it is this: The policy says, "We insure hull, tackle, and so forth, belonging and destined for Halibut Boat Hull No. 20 building at Brown's Point, Tacoma, Washington."

We say that the only way that you can arrive at the meaning of that phrase, Hull No. 20, is by reference to the construction contract, which completely defines it; and that definition excludes the material automatically and necessarily excludes coverage for the material contended for here.

The Court: I am ready to rule upon this question. The objections to the Defendant's offer of its exhibit A-1 are overruled, and that exhibit is now admitted in evidence, with the same effect, as I understand, by stipulation of counsel, as if the jury were present.

Mr. Stafford: I am perfectly willing to stipulate on that.

Mr. Maloy: I would like to have an exception, your Honor.

(Testimony of Hans Mikelsen.)

The Court: You may take and you are allowed an exception to the court's ruling.

Do you have any objection to the court's ruling upon this and admitting it in evidence when the jury is [42] not present? Is that point in your mind?

Mr. Maloy: No, that isn't the point. I object to it on the ground that it is irrelevant and immaterial, and no part of the insurance contract. There is no reference in the insurance contract to it. If it is admissible at all, it should be admissible as a part of the Defendant's case in chief, not now.

The Court: As I understand, that is the way it is being offered and also received. I admitted it out of order, it being offered as a part of the Defendant's case in chief, and in no other way, Mr. Maloy.

Did I misunderstand you? That was the condition of your offer, was it?

Mr. Stafford: That is right. You did not misunderstand me.

The Court: Very well.

(Whereupon, Defendant's Exhibit A-1 for identification was admitted in evidence.)

Mr. Stafford: Now, if your Honor please, with the policy and the agreement in evidence, and the admissions by Plaintiffs of record in this case, it is the position of the Defendant that, because the construction agreement for the purpose of this trial designated as Defendant's Exhibit A-1, provides a clear and unambiguous definition of the subject

(Testimony of Hans Mikelsen.)

matter of this insurance, so that resort to any parol evidence outside of these documents is unnecessary and improper.

The Court: Well, to what thing are you addressing this objection?

Mr. Stafford: I am addressing this objection to the [43] question last propounded by counsel for the Plaintiffs to the witness who is now on the stand, Mr. Mikelsen.

The Court: That objection is overruled.

Are there any other matters now that you anticipate may need to be taken up in the absence of the jury?

Mr. Stafford: No, I think not.

The Court: If not, bring in the jury.

(Whereupon, the jury returned to the jury box, and in their presence and within their hearing, the following proceedings occurred:)

The Court: Let the record show all are present. You may proceed.

Q. (Mr. Maloy): Mr. Mikelsen, we were speaking of your going up to Mr. Wheelock's office, you and Mr. Hanney, in August, 1941, regarding this insurance policy. I would like to ask you to tell the jury in your own words what conversation you and Mr. Hanney had with Mr. Wheelock on that occasion.

A. In August, 1941, I think it was on the 20th, we built this boat, and we also bought some netting for this boat—gear, we call it—down at the dock here, at Fishermen's Dock in Ballard; and we got

(Testimony of Hans Mikelsen.)

this insurance policy from Wheelock, and we didn't read it, so we asked him if this covered the stuff we got stored in the locker. He said, "Yes, it *cover* everything."

Q. Did you discuss the different clauses and conditions of the policy with him upon that occasion?

A. Yes. [44]

Q. I wish you would take the policy, I believe it is Plaintiffs' Exhibit 1, and point out and read any clause that you recall his having read to you upon that occasion.

A. Yes, this one here. He read the first one and he read this one.

The Court: Read it slowly, will you?

Q. (Mr. Maloy): Which one did he read first?

A. "On hull, tackle, apparel, ordnance, munitions, artillery, engines, boilers, machinery, appurtenances and so forth, including plans, patterns, molds and so forth, boats and other furniture and fixtures."

Q. Is that all of it? A. No.

Q. Read all of that clause, then.

A. And then, down here, he did read this one. "This insurance is also to cover all risks, including fire, while under construction and/or fitting out, including materials in buildings, work shops, yards and docks of the assured, or on quays, pontoons, etc."

Q. Did he read any other clauses of the policy?

A. Then he went farther down and he read another one.

(Testimony of Hans Mikelsen.)

Q. Do you remember what that one was?

A. I can't remember, but he said that this will cover you—

Mr. Stafford (Interrupting): Just a moment. I move to strike that.

The Court: Well, it is not responsive.

Mr. Stafford: No, it is not responsive.

The Court: That objection is sustained.

Q. (Mr. Maloy): I will ask this question, then: what else did [45] he say about those clauses?

A. He said, "This policy *cover* you with everything."

Mr. Stafford: Now, if your Honor please—

Q. (Interrupting): What were you—

Mr. Stafford (Interrupting): Just a moment. I move that that answer be stricken, and that the record show that we object to this testimony as being inadmissible because it is parol evidence, tending to vary the written contract which is before this court, and to extend this insurance in a manner in which it cannot be extended.

The Court: Do you wish to respond for the record what purpose you have in mind in offering this evidence?

Mr. Maloy: Yes, your Honor. I am offering the evidence to explain the ambiguity in the contract.

The Court: The intention of the parties by the use of the language in question?

Mr. Maloy: Yes, your Honor.

The Court: The objection is overruled.

Mr. Stafford: Exception.

(Testimony of Hans Mikelsen.)

The Court: Allowed:

Mr. Maloy: Now, would you read the question?

(The last question and answer thereto were read by the reporter.)

Q. (Mr. Maloy): In this conversation, who of you and Mr. Hanney did the talking? Did both of you talk or just one of you?

A. Both of us.

Q. Did you tell Mr. Wheelock where this fishing gear and equipment was at the time?

A. Yes. [46]

Q. Where did you tell him it was?

Mr. Stafford: If your Honor please, I am sorry that we couldn't agree so as not to make these objections necessary; but, not having so agreed, I must continue to make them.

I object to the witness being permitted to answer that question on the ground that it calls for parol evidence to vary a written contract, and to extend this insurance in a manner in which it cannot be extended, and because there is no ambiguity now before this court which needs explaining.

The Court: The objection is overruled.

Q. (Mr. Maloy): Now, will you answer that question, Mr. Mikelsen?

A. What?

The Court: Read the question to him.

(The question was read by the reporter.)

A. At Fishermen's Dock in Ballard.

(Testimony of Hans Mikelsen.)

Q. (Mr. Maloy): What is that?

A. At the Fishermen's Dock.

Q. What do they call it?

Mr. Stafford: The same objection.

The Court: Overruled.

Q. (Mr. Maloy): What do they call the Fishermen's Dock? Has it got any specific name?

A. Seattle Terminal.

Q. Salmon Bay Terminal?

A. Salmon Bay Terminal.

Q. Yes.

A. That is what they call it. [47]

Q. Did you tell him where it was in the Salmon Bay Terminal? A. Yes.

Q. Where? A. In Locker 325.

Mr. Stafford: The same objection.

The Court: Overruled.

Q. (Mr. Maloy): Did you and Mr. Hanney and Mr. Vohl subsequently acquire this fishing gear and equipment which was located in Locker 325 at Salmon Bay Terminal? A. Yes.

Q. From whom did you acquire it? From whom did you buy it?

A. We buy it from Henry Stakset.

Q. Where does Henry Stakset live?

A. Tacoma, Washington.

Q. When did you buy it from Mr. Stakset?

A. We were talking about the price in the early part of the spring, in May; but then later on when he came from Alaska, then we bought it. It was in the first part of August.

(Testimony of Hans Mikelsen.)

Q. In August? A. Yes.

The Court: What year?

Q. (Mr. Maloy): Of 1941? A. '41.

Q. Now, did you mention to Mr. Wheelock Mr. Stakset's name? A. Yes.

Mr. Stafford: The same objection, if your Honor please.

The Court: Overruled.

Q. (Mr. Maloy): What did you tell Mr. Wheelock, if anything, [48] with reference to this property that you were buying from Mr. Stakset?

Mr. Stafford: The same objection.

A. I told him that we bought this——

Mr. Stafford: (Interrupting) Just a minute, Mr. Mikelsen.

The Court: Overruled.

Q. (Mr. Maloy): Go ahead and answer the question.

A. I told him that we bought this netting and property from Stakset, that we wanted covered, and he said "Yes".

Q. What is that?

A. And he said "Yes, it is covered." He didn't read the whole policy.

Q. Now, did you get the policy that day?

A. No, we didn't.

Q. Did you order the policy that day?

A. I believe he send the policy to Mr. Hanney.

Q. Yes; I will ask you about that later, but did you order the policy issued at that time?

A. Yes.

(Testimony of Hans Mikelsen.)

Q. Then did you get the policy later on?

A. Yes, later on we got it.

Q. Who was it mailed to?

A. Mr. Hanney.

Q. Now, then, did you pay him a premium at that time?

A. I can't remember if we did. I think we did.

Q. Do you recall how much it was?

A. I think it was \$110.

Q. \$110? A. Yes. [49]

Q. By the way, were you fishing that fall, in 1941? A. The fall?

Q. The fall of '41 were you fishing?

A. Yes.

Q. When you are fishing, how long are you out for each time that you go out fishing?

A. Oh, we are about three weeks at a time.

Q. Then you come back to town?

A. Yes.

Q. Now, then, did you make any arrangement with Mr. Wheelock about having this policy of insurance, that has been offered here in evidence, and you read from, extended? A. Yes.

Mr. Stafford: Now, if your Honor please, I object to that as being immaterial. The Defendant has admitted that the policy was in effect.

Mr. Maloy: Well, I will tell you; to save time, Mr. Stafford, you can let the record show that there is an objection to every question I ask, and you can have an exception.

(Testimony of Hans Mikelsen.)

Mr. Stafford: I asked you to permit me to do that, Mr. Maloy, and you declined.

Mr. Maloy: You can have that running objection, if you want to, just to save time.

Mr. Stafford: I made that request and you declined.

Mr. Maloy: I didn't hear it, or I certainly would have granted it.

The Court: Let the record show that.

Q. (Mr. Maloy): Will you answer the question now, Mr. Mikelsen, about the extension? Did you make any arrangements [50] to have the policy extended from time to time?

A. Every 30 days.

The Court: May the Court ask this favor of counsel, however, this convenience of counsel, that if there is any new question raised to which there is an objection, under this arrangement, I wish you would advise the court of it.

Mr. Stafford: I would be glad to, your Honor; and, of course, it must be understood that the objection which is standing to these questions is the objection which was made in the absence of the jury.

The Court: Very well. I want to say at this time that that document the witness has been reading from, which he calls the insurance policy, I believe, or which has been referred to as such, is what has been received in evidence as Plaintiffs' Exhibit 1. It has already been admitted, and it is

(Testimony of Hans Mikelsen.)

being referred to as an instrument already before the jury and the court.

Mr. Maloy: I will say this for the benefit of the jury and the court, that I will read what I consider the material questions of the policy. I would like to read it to the jury at a later point in the trial.

The Court: Very well.

Q. (Mr. Maloy): Now, Mr. Mikelsen, before this personal property was in Locker 325 that was purchased by you and Mr. Hanney and Mr. Vohl from Henry Stakset, had you examined it?

A. Yes.

Q. When did you do that?

A. It were in July in '41. [51]

Q. Where did you examine it?

A. In the locker at 325.

Q. What condition did you find it in?

A. Very good condition; very good..

Q. Did you and Mr. Stakset make up an inventory at the time that you agreed to purchase it?

A. Me and Mr. Vohl, we went over everything and put it down, took an inventory, and then we took this list over to Stakset and he said, "That is right, that is what is in the locker."

Mr. Maloy: We have that inventory here as an exhibit to the Henry Stakset deposition, your Honor, that was taken by the defendant; Mr. Stakset's deposition having been taken at San Francisco. I wish to have, as a part of this witness'

(Testimony of Hans Mikelsen.)

testimony, this exhibit, which is the inventory, identified, and I would like to offer it.

The Court: Do counsel on both sides agree that that inventory now attached to the original of the Stakset deposition may be detached from there and marked Plaintiff's Exhibit 2?

Mr. Stafford: Yes, if your Honor please.

Mr. Maloy: Yes.

Mr. Stafford: The record should show that it has been so detached.

The Court: The list of property written with a blue typewriter ribbon on yellow paper, marked "De. of Stakset Exhibit No. 1, 10-18-44, K. G. Gagan, Reporter", has been by the court detached from the original deposition of the witness Henry Stakset on file in this case, and is now by the clerk marked Plaintiffs' Exhibit 2. [52]

(Whereupon, the inventory above referred to was marked Plaintiffs' Exhibit 2 for identification.)

Q. (Mr. Maloy): You have been handed, Mr. Mikelsen, Plaintiffs' Exhibit 2, a yellow piece of paper with a list of property on it. What is that exhibit? A. What?

Q. What is that? What is it?

A. This here?

Q. Yes.

A. That is the stuff that was in—the gear that was in the Locker 325.

Q. Is that the inventory that you and Mr. Stakset made up?

(Testimony of Hans Mikelsen.)

A. This is the inventory.

Q. Do you know whether Mr. Stakset signed the inventory at the time that you took over this personal property?

A. I can't remember, but I think it is.

Q. Look at the exhibit and see if you find his signature anywhere on it?

A. Oh, yes, here it is. This is his signature.

Q. And how about the second page?

The Court: The witness pointed to a signature on the lower right-hand corner of the front sheet.

Mr. Maloy: Of the inventory.

The Court: Of the first page.

Mr. Maloy: Plaintiffs' Exhibit 2.

The Witness: Yes.

Q. (Mr. Maloy): Do you find his signature on the second sheet also? A. Yes. [53]

Mr. Maloy: I will now offer Plaintiffs' Exhibit 2, your Honor, as an exhibit.

Mr. Stafford: May I have an opportunity to examine it?

Mr. Maloy: Sure.

Mr. Stafford: No objection.

The Court: Admitted.

(Whereupon, Plaintiffs' Exhibit No. 2 for identificaton was admited in evidence.)

[Set forth as Exhibit B to the Complaint at p. 23, except that Exhibit B also shows weight and value.]

Q. (Mr. Maloy): Is there any webbing listed on that inventory, Mr. Mikelsen? A. Yes.

(Testimony of Hans Mikelsen.)

Q. What is webbing? Will you explain that to the jury?

A. Webbing is net, what we call netting, to make up the purse seine.

Q. Where was this webbing and this netting?

A. It was in Locker 325.

Q. How was it kept or preserved?

A. It was salted down in a big bin.

Q. Salted down? A. Yes.

Q. What is the purpose of salting netting down? A. So it isn't going to rot.

Q. To preserve it? A. Yes, preserve it.

Q. This was salted down, was it? A. Yes.

Q. Now, then, you say you and Mr. Vohl examined all of that personal property in there?

A. Yes, sir. [54]

Q. What was the condition of the webbing?

A. Very good.

Q. I believe there was some purse wire there too, wasn't there?

A. Yes, some purse wire that was brand new.

Q. Was any other part of that property brand new?

A. One bale of netting. I think it was about 160 fathoms long. ,

Q. And that, you say, was brand new?

A. Yes.

Q. Besides those two items that you identified in this list was there anything else brand new?

A. Some rope.

Q. What kind of rope?

A. Manila rope.

(Testimony of Hans Mikelsen.)

Q. How much did you pay Mr. Stakset for this personal property that was stored in the locker?

A. \$4,000.

Q. What was it worth at that time?

A. Oh, I should say—

Mr. Stafford: (Interrupting) Just a moment, if your Honor please. I object to that. I think the price that was paid is the best evidence of its value at that time.

Mr. Maloy: I have authority.

The Court: Is there a different rule in the case of personal property like this from that of real property?

Mr. Stafford: I know of no different rule.

Mr. Maloy: No, no different rule, your Honor.

[55]

The Court: An owner of real property is permitted to state what it was worth, the fair cash market value on the day in question.

Mr. Stafford: But the fair cash market value as of the day he bought it is not in question. The only fair—

The Court: Is that the basis of your objection?

Mr. Stafford: Yes. The only fair cash market value is—

The Court: When it was destroyed?

Mr. Stafford: When it was destroyed. We are not interested in what it was worth in September.

Mr. Maloy: Most assuredly, your Honor, an owner can always testify to the value of his property at any time. The Supreme Court of Washington has held that in several cases, the leading one

(Testimony of Hans Mikelsen.)

being Wickman vs. Allraun, 122 Wash., Page 546.

Now, there is also a continuing presumption. If you show the condition of property and the care that is given to it from one particular period of time, from one date, for instance, to another, and you show there is no difference in its condition, or you might show that because of a scarcity in the market it became more valuable, you would have a right to prove that also. All facts concerning the personal property—what was paid for it, the cost of replacement, what the owner believes it to have been worth, and the care that was given to it, its condition, and all those things, I expect to go into to show the condition of this property, and consequently its value. [56]

The Court: I think you would shorten it by indicating whether or not you propose to show its value was the same on the day it was lost as at some other time that this witness knows about.

Mr. Maloy: I expect to show it was worth more, your Honor, and I expect to show the reasons why it was [57] worth more.

The Court: By this witness?

Mr. Maloy: Yes, by this witness.

The Court: Well, the objection is sustained. The time of loss is the material time of value.

Mr. Maloy: Very well: I take an exception, please.

The Court: Allowed.

Q. (Mr. Maloy) Mr. Mikelsen, after you and

(Testimony of Hans Mikelsen.)

your partners acquired this personal property in Locker 325, where was it kept from then on?

A. The same locker.

Q. Was it destroyed by fire at any time?

A. Yes.

Q. When was that, do you remember?

A. '42; February in '42.

Q. In February, 1942?

A. I think it was in '42.

Q. They had a big fire, did they, down at the Salmon Bay Terminal? A. Yes.

Q. What was that property included in this list, in this inventory, worth on February 24, 1942?

A. It was worth about \$7,000.

Q. About \$7,000? A. Yes.

Q. When? In 1942? A. In 1941.

Mr. Stafford: I object to that, your Honor. The witness has already answered the question.

The Court: The objection is overruled. [58]

Q. (Mr. Maloy): Just go ahead and complete your answer.

A. In '41, when we took the inventory, it was worth about \$7,000.

Q. When? A. In '41.

Q. What was it worth on February 24, 1942?

A. Well, it cost us to get a new net around \$12,000.

Q. How much? A. Around \$12,000.

Q. \$12,000? A. Yes.

Q. What was this property that you lost in this

(Testimony of Hans Mikelsen.)

fire worth on February 24, 1942, when it was destroyed? A. I say it was worth \$12,000.

Q. It was worth \$12,000? Before the property was destroyed by fire, had you had any further conversations with Mr. Wheelock, the insurance agent, after the policy was issued in August, 1941?

Mr. Stafford: It is my understanding my objection goes to all this material.

Mr. Maloy: Oh, yes.

Q. (Mr. Maloy): Had you had any other conversations with Mr. Wheelock after the policy was issued? A. Yes.

Q. When?

A. When we come in from fishing we went up and talked to him, and he also want the insurance on the hull when the boat were completed.

Q. He was soliciting that from you fellows?

A. No, he didn't. [59]

Q. Well, did he ask you for it?

A. Yes, he did.

Q. Did you tend to any renewals of the insurance from time to time yourself personally?

A. Yes.

Q. Do you recall any particular occasion when you did?

A. I think it was in '42, in February, I went up and paid him a check so it won't run out, the insurance.

(Whereupon, a cancelled check, signed by Hans Mikelsen, dated February 24, 1942, was marked Plaintiffs' Exhibit 3 for identification.)

(Testimony of Hans Mikelsen.)

Q. (Mr. Maloy): You are being handed, Mr. Mikelsen, Plaintiffs' Exhibit 3. Will you look at it and tell the jury what it is? I say, will you look at Plaintiffs' Exhibit 3 and tell the jury what it is?

A. I didn't get you.

The Court: What is that?

Mr. Maloy: He doesn't understand me apparently.

Q. (Mr. Maloy): What is it you have in your hand, Mr. Mikelsen?

A. A check. The check I give Mr. Wheelock.

Q. And that is Plaintiffs' Exhibit 3? It has been marked Exhibit 3, hasn't it?

A. That is right.

Q. When did you give that to Mr. Wheelock?

A. In '42, February in '42.

Q. The day the check bears date?

A. The 24th.

Q. Now, did you have any discussion with him then in regard to the coverage provided for in the policy?

A. Every time I went up there—— [60]

Mr. Stafford (Interrupting): Just a moment, Mr. Mikelsen. Are you offering it in evidence?

Mr. Maloy: I will in just a moment.

Mr. Stafford: All right. Go ahead.

Q. (Mr. Maloy): Answer the question, please.

A. Every time I went up I asked him to be sure that everything is covered. "Sure; sure," he said, "it is covered."

(Testimony of Hans Mikelsen.)

Mr. Maloy: I will offer Plaintiffs' Exhibit 3, the check.

Mr. Stafford: The same objection I have been making to all this testimony.

The Court: The objection is overruled. Admitted.

(Whereupon, Plaintiffs' Exhibit 3 for identification was admitted in evidence.)

Q. (Mr. Maloy): What was the check given to Mr. Wheelock for?

A. It was given to him so that everything we had insured would be covered.

Mr. Stafford: Now, just a moment, if your Honor please. I move especially that that answer be stricken as not responsive.

The Court: If what is in his mind is what he said to Mr. Wheelock——

Q. (Mr. Maloy): Did you say that to Mr. Wheelock? What did you say to Mr. Wheelock?

A. I asked Mr. Wheelock, "Everything is covered so we are insured?" "Sure," he said, "everything is covered."

Mr. Maloy: May I read the inventory to the jury, your Honor?

The Court: Yes. I still have some doubt about the statement objected to. That objection is sustained and [61] that answer is stricken. The jury will disregard it. These last two answers that he made will stand.

Mr. Maloy: I am directing the jury's attention

(Testimony of Hans Mikelsen.)

to Plaintiffs' Exhibit 2. It is the inventory we have spoken of, and I would like to read it.

(Whereupon, Mr. Maloy reads Plaintiffs' Exhibit 2 to the jury.)

Q. (Mr. Maloy): Now, Mr. Mikelsen, was all of that property destroyed in that fire?

A. It was destroyed except two blocks, hand-made blocks.

Q. What are they? What do you mean by blocks? What are these, wood blocks?

A. It isn't wood blocks. They are made of iron.

Q. Oh, they are made of iron? A. Yes.

Q. What were the two you say that weren't destroyed? What about them?

A. I took them and I went over to the blacksmith at Fishermen's Dock and I asked him if he could use them; so he said, "If I were you, I wouldn't use them," but we have still got them aboard the boat. We haven't used them.

Q. You haven't been able to use them?

A. No, we haven't been able to use them. We have still got them.

Q. Now, all that property included in that inventory, is it all fishing gear and equipment?

A. All fishing gear.

Q. And when you and your partners bought it from Henry Stakset, what was your purpose in buying it from him?

A. To use it on this boat that we got built. [62]

Q. That is, the Hull No. 20?

A. That is right.

(Testimony of Hans Mikelsen.)

Q. After the fire, did you have any occasion or did you have any discussion—I will put it that way—with Mr. Wheelock, the insurance agent?

A. Yes.

Q. How long after the fire did you see him?

A. Oh, I would say about—

Mr. Stafford (Interrupting): Now, just a minute, if your Honor please. The running objection which has been going, as I understand, to all of this testimony, still goes as to this question; but there is the additional objection. Regardless of what contact this gentleman may or may not have had with Mr. Wheelock after the fire can't possibly affect the interpretation of this contract.

Mr. Maloy: That isn't the purpose of it at all, Mr. Stafford. The purpose of it is to show that Mr. Mikelsen discussed this question of the company's liability under this policy with the agent who wrote it.

Mr. Stafford: That is precisely the point, your Honor.

Mr. Maloy: And certainly we have a right to prove that.

The Court: You can tell what he said or did.

Mr. Maloy: That is right.

The Court: Try to use his own words without stating the effect thereof.

Mr. Maloy: Yes. What I want, of course, is for Mr. Mikelsen to say just what conversation he had.

(Testimony of Hans Mikelsen.)

Q. (Mr. Maloy): Now, you say you did have a conversation with [63] Mr. Wheelock after the fire?

A. Yes.

Q. Can you fix the time?

A. I would say about four or five days after the fire.

Q. Just tell the court and jury what you discussed and what you said and what he said.

A. I went up to him and I say, "Well, how about the money? We have got some money coming now from the insurance?" "Oh, yes, but you know," he said, "the insurance company is always slow paying, but I will do the best I can to get it for you."

Q. Did you hear any further from him about it?

A. No, I didn't hear. Then I went up again, and then there was a girl in the office, and she said she hasn't heard anything. Wheelock wasn't there at that time.

Q. You don't know the name of the girl, do you?

A. No.

Q. The girl worked there in the office?

A. Yes, I think so.

Q. That is, Mr. Wheelock's office?

A. Yes.

Q. Now, then, what else did you do towards collecting this money that you claim was due you under this policy?

A. Then later on, then Wheelock came down to Brown's Point and want to insure the hull, so I asked him about the money we have got coming.

(Testimony of Hans Mikelsen.)

Well, he said he hasn't heard anything yet, so when Mr. Vohl and Henry come over, I told them that there is no money yet, so we had better place the insurance with somebody else.

Q. What insurance? [64]

A. Hansen and Rowland.

Q. I mean what insurance do you refer to that you were going to place with somebody else?

A. The hull insurance.

Mr. Stafford: If your Honor please, I still insist that all of this material is immaterial.

The Court: This testimony about hull insurance, unless it has—

Mr. Maloy (Interposing): Well, I will connect it up, your Honor.

The Court (Continuing): —unless it has some connection, it shouldn't be introduced.

Mr. Maloy: I will connect it up in just a moment.

The Court: Very well.

Q. (Mr. Maloy): Had Mr. Wheelock approached you with a view of soliciting the hull insurance? A. Yes.

Q. And you didn't write the hull insurance with him? A. No, I didn't.

Q. Who did you write it with?

A. Hansen and Rowland.

Q. What did you do next with a view to putting in a claim to the insurance company for your loss on account of this fire?

(Testimony of Hans Mikelsen.)

A. When Mr. Duren, the agent for Hansen and Rowland, come down to Brown's Point, and we were talking about the fire, I said, "We have got some money coming, but they seem to be slow paying." So he said, "Let me see your contract, the policy." So I showed him the policy. He said, "Well, it shows plain here. You can collect some money on this. [65] You have got the money coming," he said.

Q. What did you do?

A. Well, I gave the contract to him and I said, "Well, if you can do something for us, go ahead and do it."

Mr. Stafford: If your Honor please—

The Court: If he is reporting what somebody said in the absence of Mr. Wheelock about what rights he had on this policy, Plaintiffs' Exhibit 1—

Mr. Maloy (Interrupting): Yes, that would be hearsay.

Mr. Stafford: I move that the whole answer be stricken.

The Court: It is sustained.

Mr. Maloy: That last statement may be hearsay, of course, as to what he said and Mr. Duren said.

The Court: That is right. It is stricken, and the jury will disregard it wholly.

Mr. Maloy: Now, I will just state to Mr. Mikelsen, you can't tell what somebody else told you.

The Court: Other than Mr. Wheelock.

(Testimony of Hans Mikelsen.)

Mr. Maloy: Other than Mr. Wheelock.

Q. (Mr. Maloy): Now, what I want to get you to tell the jury, Mr. Mikelsen, did you appoint Mr. Duren or anybody else to take the matter of your claim up with the insurance company?

A. When the boat were completed and gone to Alaska, I told Mr. Duren, "You take care of this." He says, "Sure, I will take care of it for you."

Q. Do you know whether Mr. Duren did make a claim to the insurance company?

A. He told me when I came from Alaska—

[66]

Q. (Interrupting): Never mind. You can't state what he told you. Do you know whether he did make a claim or not? A. Yes.

Q. Your claim was turned down, wasn't it?

A. Yes, it was turned down.

Mr. Maloy: All right. I don't think of any other questions on direct at this time, your Honor, but I would like to reserve the right to recall the witness if I think of something I have overlooked.

The Court: You may have that right.

Mr. Maloy: I would like, however, to read certain portions of the insurance contract to the jury.

The Court: You may do that now.

(Mr. Maloy reads portions of Plaintiffs' Exhibit 1 to the jury.)

Q. Mr. Maloy: Now, Mr. Mikelsen—I do think of something I want to ask him now, your Honor. It will be very short, however.

(Testimony of Hans Mikelsen.)

Mr. Hikelsen, when you purchased this personal property from Mr. Stakset, did you have possession of Locker No. 325 in which is was stored?

A. Yes.

Q. Who gave you the key?

A. Mr. Fox. He got charge of the dock.

Q. Who is Mr. Fox?

A. He is the Port Captain.

Q. At the dock? A. At the dock.

Q. Did you get the key from him? [67]

A. Yes. Mr. Stakset told him to give us the key any time we wanted.

Q. Who had the control and possession of Locker 325 after you purchased this personal property from Stakset? A. We did.

Q. And who do you mean by "we"?

A. Mr. Hanney and Vohl and me.

Mr. Maloy: I don't think of anything else right now, your Honor. You may cross examine.

Cross-Examination

By Mr. Stafford:

Q. On what date was the keel of this Hull No. 20 laid, Mr. Mikelsen?

A. It was laid about the middle of August in '41.

Q. Do you know the exact date?

A. I couldn't remember the exact date. I couldn't.

Q. Up to that time there had been no work done on the construction of that boat at all, had there?

A. Well, they were working on planking and frames and so forth.

(Testimony of Hans Mikelsen.)

Q. There had been nothing done toward constructing it, had there? No construction started?

A. No.

Q. When was the first time you ever saw Mr. Wheelock? A. August 20.

Q. You are sure of that date? A. Yes.

Q. What makes you so certain of it?

A. We have got it in the policy. [68]

Q. Because that is the date of the policy?

A. Yes.

Q. Now, I think you said that you saw him in his office in the Insurance Building on that day?

A. Yes.

Q. Was that in the morning or afternoon?

A. Well, it is so long now I couldn't say, but it was the 20th. If it was the middle of the day or at night, I couldn't remember that.

Q. Who was with you? A. Mr. Hanney.

Q. You and Mr. Hanney? A. Yes.

Q. That is the first time you ever saw Mr. Wheelock in your life, isn't it? A. No.

Q. When had you seen him before?

A. I seen him before.

Q. When?

A. Well, that is another thing. I couldn't answer that, but I know Mr. Hanney pointed him out, "That is the fellow that got the war risk on the boat."

Q. The war risk?

A. I mean the builders risk.

(Testimony of Hans Mikelsen.)

Q. How long before that was that statement made? A. Well, I can't remember that.

Q. Well, would it be two months? Three months? A. No, it wasn't that long.

Q. Was it a month? About a month. [69]

Q. About a month? A. Yes.

Q. In other words, that would be about the middle of July? A. Yes.

Q. 1941? A. Yes.

Q. That Hanney pointed out Wheelock to you?

A. One time he walked down the street. He passed him, and Mr. Hanney said, "That is the fellow that got the policy."

Q. Got the builders risk insurance.

A. Yes.

Q. Is that all he said? A. Yes.

Q. You didn't have any talk with Wheelock then? A. No, I never spoke to him.

Q. So that the first time that you saw Wheelock to talk to was on August 20, 1941?

A. That is right.

Q. In his office? A. That is right.

Q. When did you first see the insurance policy from which Mr. Maloy was just reading?

A. August 20, 1941.

Q. You now have that policy which is marked Plaintiffs' Exhibit 1 before you. A. Yes.

Q. Now, you saw that policy first on August 20, 1941? A. Yes. He read it to us.

Q. Now, just a moment. Answer my question

(Testimony of Hans Mikelsen.)

and that will be sufficient. You first saw it on August 20, 1941? [70] A. That is right.

Q. And was it then as it is now in front of you?

A. No.

Q. What was the difference?

A. He haven't filled in this. He just read them clause.

Q. Pardon me?

A. He just read them clause what cover the boat.

Q. Then you didn't see that policy, then, on August 20, did you.

A. Well, it was the policy that he read to us, what we have got there.

Q. When did you first see that policy that is before you? A. August 20.

Q. And it was then in the condition it now is in?

A. No.

Q. Well, in what respect was it different?

A. About a month after he sent it to Mr. Hanney, and then Hanney showed it to me.

Q. Well, in what respect was the policy different when you saw it on August 20, 1942 from what it now is?

A. Well, all of this here wasn't filled in.

Mr. Stafford: May I come up to the witness stand?

The Court: Yes, you may, and counsel for the Plaintiffs may likewise approach the witness stand if he wishes to.

Mr. Maloy: I don't know if I need to at this time.

(Testimony of Hans Mikelsen.)

Q. (Mr. Stafford) What part was not filled in?

A. This here wasn't filled in.

Mr. Maloy: Except I would like to know what he is talking about. The jury can't get "this here" very well. [71]

The Witness: This wasn't filled in.

Mr. Maloy: You mean the blanks weren't filled in?

The Witness: No.

Q. (Mr. Stafford) You mean none of the typewriting was filled in? A. In here, no.

Q. None of the typewriting matter?

A. No.

Q. Was there any typewriting on the one you saw on August 20 at all?

A. I didn't pay no attention. He did read these clauses—

Q. (Interrupting) No, I am not asking you what he read. I am asking you what you saw on that day.

A. I saw this policy, but not this.

Q. None of that was filled in?

A. That wasn't filled in.

Q. Did you see this policy on that day? Did you see any of these papers on that day?

A. No, I didn't see them papers.

The Court: Referring to what?

Mr. Stafford: The attached endorsements. They are all part of Plaintiffs' Exhibit 1.

The Witness: I didn't see them.

(Testimony of Hans Mikelsen.)

Q. (Mr. Stafford) Then the only paper which you saw on that day was this paper?

A. Yes.

Q. This one sheet entitled "Builders Risk, Form 50 Amended", and nothing filled out in it?

A. There was nothing filled out here.

Q. So that what you saw was a form similar to this? [72] A. Yes.

Q. And you did not read it?

A. No. He did it for us.

Q. And he only read three clauses to you?

A. He read all the clauses.

Q. All of them? Did he read all of this to you?

A. No, he did read the clauses what include—

Q. (Interrupting): Just a moment. I am asking—

Mr. Maloy (Interrupting): Let him complete his answer. Don't interrupt him.

Mr. Stafford: I am asking him to complete his answer and then stop, Mr. Maloy.

Q. (Mr. Stafford): You testified on direct examination that he read three clauses from this form to you? A. Yes.

Q. Now, that is all that you know about that paper as of August 20, 1941, isn't that correct?

A. He did read the clauses,—

The Court (Interrupting): Now, you can resume your station.

Q. (Mr. Stafford): When did you next see the policy, Mr. Mikelsen?

(Testimony of Hans Mikelsen.)

A. Mr. Hanney keep the policy after that.

Q. When did you next see it?

A. I didn't see it before, oh, it was in Tacoma when this here fire, then—

Q. (Interrupting): You didn't see it again until after the fire, did you?

A. No, I didn't see it.

Q. In other words, you never did see it before the fire in [73] its present form, did you?

A. Well, he did read all this to us and what covered us, and then he sent it to Mr. Hanney.

Mr. Stafford: I move that the answer be stricken, if your Honor please.

The Court: It is stricken.

Mr. Stafford: On the ground that it is not responsive, and I will ask the court to ask the witness to answer my question.

The Court: Just keep your mind on the form of the question.

Q. (Mr. Stafford): You never did see that policy until after the fire, then, in its present form, did you? A. Yes.

Q. When?

A. I saw it up to Wheelock's office.

Q. Was it all filled out at that time?

A. No.

Q. Did you see it all filled out before the fire?

A. Yes.

Q. When?

A. It was about a month after Mr. Hanney got it from Wheelock.

(Testimony of Hans Mikelsen.)

Q. When was that?

A. About a month. In September?

Q. You saw it in September?

A. Yes.

Q. Where was that?

A. I think it was at Oluf Hanney's house.

Q. You think it was up at Hanney's house?

A. Yes. [74]

Q. Did you read it at that time?

A. Yes, we did read it, both of us.

Q. Both of you read it at that time?

A. Yes.

Q. That was in September, 1941?

A. '41.

Q. When did you buy this material from Stak-set?

A. We bought the material in—we were talking about it in—

Q. (Interrupting): No, never mind that. Now, I want to know when you bought it.

A. We bought it in August, '41.

Q. What day of August?

A. Well, I would have to go back and look in the book for that.

Q. Did you pay for it? A. Yes.

Q. Hanney didn't pay for it?

A. Yes, we all paid.

Q. How did you pay for it?

A. In checks.

Mr. Stafford: Did you bring those checks, Mr. Maloy?

(Testimony of Hans Mikelsen.)

Mr. Maloy: No, I don't believe I did.

Mr. Stafford: I demanded their production at the trial.

Mr. Maloy: Yes, I understand, but I don't think I have those checks. Have you those checks, Mr. Mikelsen, the cancelled checks?

The Witness: I don't know if we have got them, but I can get them for you.

Mr. Stafford: Can you produce them here to-morrow [75] morning?

The Witness: I think so.

Mr. Maloy: If they are available he can produce them. I don't know whether he has them.

The Court: He thinks he can.

Mr. Maloy: He will try to. I will say that for him. I will try to see to it that he does bring them here if they are in existence. I didn't know there was any argument about whether they were paid for or not. The stuff was paid for. Mr. Stakset testified in his deposition that he was paid in full.

Q. (Mr. Stafford): Now, you say that after this fire you saw Mr. Wheelock? A. Yes.

Q. On what day was that?

A. I can't remember the date, but I know that it was four or five days after the fire.

Q. And then you stated that you went back sometime later and Wheelock wasn't there?

A. Yes.

Q. When was that?

A. Oh, that must have been maybe 10 days after.

(Testimony of Hans Mikelsen.)

Q. Are you quite sure about that, about 10 days after? A. Yes.

Q. That would be about 15 days after the fire?

A. Yes, about 15 days after.

Q. That is when you saw this girl?

A. Yes.

Q. Was there more than one girl in the room?

A. No, I don't think so. [76]

Q. What time of the day was that?

A. Well, I couldn't exactly say the minute I was there, but—

Q. (Interrupting): Approximately?

A. I think it was in the middle of the day.

Q. So that that would be about the 10th of March, 1942, wouldn't it? A. Yes.

Q. That you called at Wheelock's office, he wasn't there and you talked to the girl?

A. Just about, yes.

Q. You do not remember the girl's name?

A. No. I just asked her if Wheelock was in, and if they heard anything about our money. She said "No", they hadn't heard anything.

Mr. Stafford: Of course, the latter part of that answer I move be stricken, your Honor, as not responsive. I didn't ask him about that.

The Court: Yes.

Mr. Maloy: I think I was very responsive to the question that was propounded.

The Court: Read both the question and the answer.

(Testimony of Hans Mikelsen.)

(Whereupon, the question and answer there-
to were read by the reporter.)

Mr. Maloy: What is not responsive about that?

Mr. Stafford: I asked him if he knew the girl's
name, so he goes on with a speech about coverage.

The Court: The objection is sustained. It is
stricken. The jury will disregard it.

Mr. Stafford: I don't think I have any further
[77] cross examination.

Mr. Maloy: No further questions.

The Court: You may be excused.

(Witness excused.) [78]

Mr. Maloy: I will call Mr. Hanney.

Mr. Stafford: Before the examination of Mr.
Hanney begins, your Honor, I want it noted that
the same running objection, which was permitted
by agreement of Counsel to the testimony of Mr.
Mikelsen, remain running against similar testimony
of Mr. Hanney.

The Court: Have you any objection?

Mr. Maloy: I have no objection to the record
showing that Mr. Stafford would object to every
question that I would ask this witness.

Mr. Stafford: All except his name and address.

The Court: You may proceed.

OLUF B. HANNEY,

one of the Plaintiffs, called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Will you please state your full name and address? A. Oluf B. Hanney.

Q. Where do you live?

A. 7740 - 12th Northwest.

Q. How long have you lived there, Mr. Hanney?

A. Oh, about four years.

Q. Where did you live prior to that?

A. Oh, several places. Alaska and California and sometimes Seattle.

Q. What has been your business the last twenty years or so? A. Fishing. [86]

Q. Where have you engaged in such fishing operations?

A. Oh, Alaska, Seattle, and California coast, along the coast.

Q. What kind of fishing have you been engaged in? A. Halibut and sardines.

Q. Have you been interested in or owned fishing boats from time to time? A. Yes.

Q. What kind of boats?

A. Fishing boats, halibut boats, sardine boats.

Q. Are they wooden boats?

A. Wooden boats.

Q. In the spring of 1941 were you interested in the building of a boat over at Brown's Point?

A. Yes.

(Testimony of Oluf B. Hanney.)

Q. Who was interested with you?

A. Mr. Mikelsen and Mr. Vohl.

Q. When did they become interested with you?

A. Oh, in about August, I think it was. The first of August or so.

Q. In what year? A. In 1941.

Q. Do you remember when the keel was laid for that boat?

A. No, I do not. It was around the middle of August.

Q. Along in August?

A. Along the middle of August.

Q. Before August, before the keel was laid, had you met or became acquainted with Mr. Wheelock? A. Yes.

Q. The gentleman that sits here with the iron gray hair and [87] glasses?

A. That is right.

Q. When did you first meet him?

A. Oh, I met him in the spring of 1941.

Q. In connection with what?

A. With the boat.

Q. What about the boat? A. The bond.

Q. The bond? A. Yes.

Q. Performance bond? A. Yes.

Q. Did he write it for you? A. Yes.

Q. Did you have any discussion with him at that time concerning any other kind of insurance?

A. Well, the boat was builder's risk.

Q. Builder's risk? A. Yes.

Q. That was in the spring, you say, of 1941?

(Testimony of Oluf B. Hanney.)

A. Yes.

Q. He did not write any builder's risk insurance at that time, though, did he?

A. No. There was no need of it then.

Q. No. When did you discuss with him next any matter pertaining to builder's risk insurance?

A. Well, that was in August when they started to build the boat.

Q. You said both of us. Who do you mean by both of us?

A. No, I say when they started to build the boat we talked [88] about it.

Q. Who talked about it?

A. Mikelsen and I and Mr. Vohl.

Q. Did you talk to Mr. Wheelock about it in August 1941? A. Yes.

Q. Where did the talk take place?

A. In his office.

Q. Whose office?

A. Mr. Wheelock's office.

Q. Where was that office, do you recall?

A. It was on Second Avenue. The Insurance Building.

Q. Now, did you tell Mr. Wheelock what your plans were at that time, what you wanted to do?

A. Yes.

Q. Just tell the Court and the jury what conversation took place at the time that you and Mr. Mikelsen were up at his office?

A. Well, we had this boat to be built, and we also had supplies other places.

(Testimony of Oluf B. Hanney.)

Mr. Stafford: I move that this answer be stricken. If he testifies to what was said—

The Court: (Interrupting) He can say what was said. Do not comment upon what somebody else thought or intended.

Q. (By Mr. Maloy) Just what you said to Mr. Wheelock, please, Mr. Hanney, about the builder's risk.

A. That we may buy stuff other places which would not be used at a certain time to build the boat. He said, "Well, whatever you buy is insured. Whether you have it [89] in Tacoma or Seattle or any place else, it would be insurance." So I said, "All right."

Q. Did you discuss with him anything about buying Mr. Stakset's fishing gear and equipment?

A. Well, it was along in August we did, yes.

Q. What did you tell Mr. Wheelock about buying any of Mr. Stakset's equipment and fishing gear?

A. He said that it would be insurance as well in Seattle as it would be in Tacoma.

Q. Did you have a form of policy before you at the time?

A. I had the policy—yes, he showed us the policy. We went over that policy several times.

Q. Well, now, was the policy written up at that time or later?

A. It was written out in August and mailed to me. I didn't get it for about three or four weeks after.

(Testimony of Oluf B. Hanney.)

Q. Where was it mailed to?

A. It was mailed to my home in Ballard.

Q. To your home?

A. Or at a place I lived, yes.

Q. What policy did you have before you that you went over, you said, a minute ago? What policy was that?

A. That was the builder's risk insurance.

Q. Did he read any particular portions of it to you?

A. Yes. We went over this, several of those things, and he showed me, he says, "Here it is. Your stuff is covered right here."

Q. Do you think you would be able to pick out some of the clauses that he read to you on that occasion? A. I think so. [90]

Q. Will you look at the policy, Plaintiffs' Exhibit No. 1, Mr. Hanney, and point out or read to the jury any clauses that you find which you say that he read to you upon that occasion?

A. Well, he has these two here that he read, that I remember he read, because we know we had this stuff.

Q. Well, read the first clause.

Mr. Stafford: I move that that answer be stricken.

Mr. Maloy: I think that is perfectly responsive.

The Court: Repeat the question and read the answer.

(Whereupon, the question and answer thereto were read by the reporter.)

(Testimony of Oluf B. Hanney.)

The Court: The objection is overruled.

Q. (By Mr. Maloy) Now, will you read those clauses that you say that he read to you? Read them to the jury.

A. Well, here is one: (Reading) "On hull, tackle, apparel, ordnance, munitions—"

The Court: (Interrupting) Mr. Hanney, you will have to read more slowly, and do your best to be distinct.

Q. (By Mr. Maloy) Read a little more distinctly.

The Court: In your pronunciation.

A. (Reading) "On hull, tackle, apparel, ordnance, munitions, [91] artillery, engines, boilers, machinery, appurtenances, including plans, patterns, molds, boats and other furniture and fixtures, and all material belonging and destined for Halibut Boat Hull No. 20."

Q. (By Mr. Maloy) Did he read any other clauses to you, and if so, will you please read it to the jury?

A. Well, he read this one down here.

Q. Go ahead and read it, Mr. Hanney.

A. (Reading) "This insurance is also to cover all risks, including fire, while under construction, and/or fitting out, including materials in buildings, workshops, yards and docks of the assured," —I don't understand this here.

The Court: He says he doesn't understand it.

Q. (By Mr. Maloy) You don't understand a word there?

(Testimony of Oluf B. Hanney.)

A. I don't understand it. I can't see it. The next one is pontoons, rafts, wherever she may be laying, and all risk or loss or damage through collapse of supports or ways, from any cause whatever, and all risks of launching.

Q. Were there any other clauses of that policy or that form that he read to you at that time?

A. Well, we went over it so many times, several times.

Q. Do you recall of any other clauses?

A. I recall those two pretty well.

Q. What?

A. I recall those two pretty well because those was the main things.

Q. Did you have any conversation with him at that time re- [92] garding any of this personal property in the locker down at the Salmon Bay Terminal? A. Yes.

Q. What did you tell him about it?

A. Well, we told him we had it there.

Q. Did you say anything to him about wanting to insure it?

A. Well, he showed us—he pointed out that it was already insured.

Q. How do you mean, he pointed out? By reading those clauses?

A. By reading those clauses, by showing us those clauses.

Q. And said you were insured? A. Yes.

Q. Now, he didn't deliver or issue the policy to you at that time, did he? A. What?

(Testimony of Oluf B. Hanney.)

Q. I say, he didn't issue and deliver the policy to you at that time?

A. No, not at that time. He sent it to us.

Q. Now, who had the key or the possession and control of this personal property in this locker?

A. Mr. Mikelsen and Mr. Fox, I believe it is.

Q. By Mr. Fox, you mean the custodian down there at the Salmon Bay Terminal?

A. Yes, the Salmon Bay Terminal.

Q. He is the custodian down there?

A. Yes.

Q. Or was, anyway?

A. He is the boss. He takes care of the dock.

Q. Did anybody else have any right of access to this locker [93] 325 other than you and Mr. Vohl and Mr. Mikelsen? A. No.

Q. Did you inspect this equipment and fishing gear that was in Locker 325 before you purchased it from Stakset?

A. Mr. Mikelsen and Mr. Vohl did.

Q. They did, but you didn't? A. No.

Q. Did that stuff remain there in the locker until the fire? A. Yes.

Mr. Stafford: If he knows. I thought he said he didn't see it.

Mr. Maloy: Well, he didn't see it before they bought it.

Q. (By Mr. Maloy) Do you know whether or not the fishing gear and equipment which you purchased from Mr. Stakset remained in the locker

(Testimony of Oluf B. Hanney.)

from the time you purchased it to the time of the fire? A. Yes, it remained there.

Q. You didn't take any of it out? A. No.

Q. What happened to it in February 1942?

A. 1942? It burned up.

Q. It burned up? It became a total loss?

A. Yes.

Q. Did you at any other time, other than this time in August 1941, and after this policy was issued, have any occasion to discuss the policy with Mr. Wheelock?

A. Well, we were up there from time to time to be sure that it was insured, but I could not say exactly the [94] exact date.

Mr. Stafford: I object to that, your Honor, as not responsive. He was asked if he discussed this after the policy was written with Mr. Wheelock.

Mr. Maloy: I think he answered. He said that he had been up there, but he didn't remember just exactly what they discussed, to see if it was insured.

Mr. Stafford: I wish the reporter would read the answer.

The Court: All right, read the answer.

(Whereupon, the answer was read by the reporter.)

Mr. Maloy: I think that is perfectly responsive.

Mr. Stafford: He was asked if he talked to Wheelock. I maintain that answer is not responsive to that question, and I move to strike it.

(Testimony of Oluf B. Hanney.)

Mr. Maloy: I am certainly going to object to the motion to strike, because I think it is responsive.

The Court: If the Examiner wishes to leave the answer incomplete, I would say, rather than unresponsive, that it is incomplete. The objection is overruled.

Q. (By Mr. Maloy) You say you were up there at Wheelock's office from time to time. What were you up there for?

A. I was up there to be sure that the boat was—

Mr. Stafford: (Interrupting) Now, if your Honor please, I am objecting to that.

The Court: You can ask him what he talked [95] about or what he did, but you can't have him state what was in his mind as the purpose of being there.

Mr. Maloy: I think he can testify as to what his intent was.

The Court: The objection is sustained. You can ask him what he did and what he said, and what the other gentlemen said or did.

Mr. Maloy: Well, your Honor, I have several decisions from our Supreme Court where they hold that a person can testify what his intention was in doing anything.

The Court: Disconnected from his acts?

Mr. Maloy: Yes, your Honor. He can testify as to what his intention was.

The Court: This objection will be sustained.

(Testimony of Oluf B. Hanney.)

Mr. Maloy: Exception. I would like to present that authority tomorrow morning to your Honor.

The Court: The exception is allowed, and I will try to find some time to hear the argument further, if you would like.

Mr. Maloy: It won't take long, because it is a very well laid down rule. There is a unanimity of authority on it.

Q. (By Mr. Maloy) Mr. Hanney, was this policy renewed from time to time? A. Yes.

Q. Who took care of the renewals of you three that owned this personal property which was destroyed? A. Mr. Wheelock. [96]

Q. Yes, I know; but which one of you, Mr. Vohl or Mr. Mikelsen or yourself, or did all of you look after renewing it?

A. We all looked after it. Mikelsen and Vohl was the ones that looked after it. They were here in the spring?

Q. Where were you?

A. I was out fishing. I was here from time to time, but I was out fishing most of the time.

Q. But they were here? A. Yes.

Q. Mr. Vohl and Mr. Mikelsen, so they looked after it, is that the idea?

A. That is the idea.

Q. How much did you fellows pay Henry Stakset for this fishing gear and equipment?

A. \$4,000.

Q. Do you know what happened to Mr. Stakset's vessel, the *Midnight Sun*?

(Testimony of Oluf B. Hanney.)

A. The Government took it over after the war.

Q. After the war commenced?

A. After the war commenced.

Mr. Stafford: I move that that answer be stricken. He was asked did he know what happened to the boat.

Mr. Maloy: Well, he answered the question, so he must have known.

The Court: The objection is overruled.

Mr. Stafford: Well, if your Honor please, there is no showing that he personally knows anything about where that boat went. [97]

The Court: If you find on cross examination that he didn't, the Court will strike it; and I can do it then just as well as now.

Mr. Maloy: You may cross-examine.

Cross Examination

By Mr. Stafford:

Q. When did you first meet Mr. Wheelock, Mr. Hanney?

A. In the spring of 1941.

Q. What month of that year?

A. I don't quite remember now.

Q. Pardon me?

A. I don't quite remember that.

Q. Was it the same month that the contract was written up for the building of the boat?

A. No, it was before that. That was at the time when we took this bond. In May, I think it was.

(Testimony of Oluf B. Hanney.)

Q. Will you refer to the last page of that document which is marked Defendant's A-1, Mr. Hanney. The last page of it, please. No, the last page. The last page. Is that your signature?

A. Yes.

Q. Where did you sign that? I mean, when did you sign it? A. Where I signed it?

Q. When did you sign it?

A. We signed it over at Brown's Point.

Q. You signed that over at Brown's Point?

A. At Brown's Point, yes.

The Court: Let the record show that Counsel [98] examining is referring to Defendant's Exhibit A-1, which has already been received and admitted in evidence.

Q. (By Mr. Stafford) When did you sign it at Brown's Point, Mr. Hanney?

A. Well, doesn't the date show here when I signed it?

Q. I am asking you if you recall when you signed it?

A. That was during the winter, in 1941.

Q. During the winter?

A. During the spring, yes.

Q. What month?

A. Well, I don't remember that.

Q. You don't know what month you signed that contract?

A. No, I don't remember that.

Q. Would it be earlier than May, do you think?

A. It might have been.

(Testimony of Oluf B. Hanney.)

Q. Could it have been later than May?

A. No, I don't think so.

Q. You are sure it wasn't later than May, but it might have been earlier? A. Yes.

Q. Who was present when you signed it?

A. Peterson.

Q. Who else?

A. His daughter. She was taking care of the office?

Q. His daughter? A. Yes.

Q. And who else?

A. I don't think there was anyone else.

Q. You and Mr. Peterson and his daughter?

[99]

A. Yes.

Q. The other signatures on that, then, is Mr. Peterson's, which you saw put on it?

A. The other one is Mr. Peterson. The other one is mine.

Q. Well, you remember Mr. Mikelsen testifying that on August 20, 1941 you and he went to Wheelock's office? A. Yes.

Q. At which time Wheelock read from a policy?

A. Yes.

Q. Is that the policy that you had before you there, from which you were reading a few minutes ago?

A. That is something similar to it, but it may not be the same policy.

Q. Well, do you know whether it was or was not the same policy?

(Testimony of Oluf B. Hanney.)

A. Yes, it was the same policy.

Q. And it was all filled out at that time?

A. No, it was not filled out.

Mr. Stafford: May I approach the witness, your Honor, with that exhibit?

The Court: Yes, you may, and opposing Counsel likewise.

Q. (By Mr. Stafford) Handing you Plaintiff's Exhibit 1, Mr. Hanney, which is the insurance policy in this case, I will ask you when you first saw that policy as it is now written?

A. In August.

Q. Then it was just like that when you saw it on August 20?

A. I don't know. I can't recall. [100]

Q. I am asking you when, to your best recollection,—

A. (Interrupting) The first time I saw it was when he mailed it to me home.

Q. That is the first time you saw that policy, is when you received it at your home?

A. Yes.

Q. And that was when?

A. That was about the first of September.

Q. So that the policy from which you say Wheelock read to you in his office on August 20, 1941,—

A. (Interrupting) We had copies of it a couple times at Mr. Wheelock's office after that.

Q. Now, just a minute. We are not talking about after that. On August 20, 1941, the form

(Testimony of Oluf B. Hanney.)

from which you say Mr. Wheelock read to you was not the policy you have in front of you, was it?

A. It looks very much the same thing to me.

Q. You didn't read it on August 20, 1941 at all, did you? A. Part of it, yes.

Q. You personally read it at that time?

A. Some of it.

Q. Or did Wheelock read it to you?

A. Mr. Wheelock read it to us.

Q. You never read any part of it at that time, did you? A. No.

Q. But you do know that none of that type-written matter was in what he read from, don't you? A. I didn't get that.

Q. Your name wasn't on the paper he read from on August 20, was it? [101]

A. No, I don't think so.

Q. So that the first time you ever saw that policy was sometime in the month of September, 1941? A. Well, probably it was.

Q. And that is when you received it by mail at your home? A. Yes.

Q. It was then that you and Mikelsen sat down and read it, wasn't it?

A. Well, we went over it with Mr. Wheelock after that.

Q. Now, just a moment. One thing at a time. When you received it at your home, you and Mikelsen sat down and read it, didn't you?

A. That is right.

(Testimony of Oluf B. Hanney.)

Q. Who drew the contract that was signed by you and Peterson, Mr. Hanney?

A. I think the girl in the office.

Q. Peterson's daughter? A. Yes.

Q. You are sure of that?

A. Pretty sure, yes.

Q. Well, are you positive of it?

A. No, I am not positive, because he was the one that had it.

Q: Now, wait a minute. I didn't understand that last part. You say Mr. Peterson was the one that had that contract drawn? A. Yes.

Q. You didn't have anything to do with having it drawn? A. No.

Q. And it was typed over at Mr. Peterson's office, is that [102] right?

A. I presume it was.

Q. Pardon me?

A. Yes, I guess it was. Anyway, he had it there in the office ready for me when I come over there.

Q. And you never saw it before?

A. I never saw it before I come there, no.

Q. What did you do with it them, after you got it?

A. What I done with it after I got it?

Q. Yes. A. I kept it.

Q. Did you show it to anybody?

A. That I don't know. I don't think so. I might have. I showed it to Mikelsen and Vohl, yes.

(Testimony of Oluf B. Hanney.)

Q. Are they the only ones you ever showed it to? A. That I don't know.

Q. Well, try and remember.

A. Well, I am trying to. I don't know. It is a long time ago. That is three or four years—three years ago.

Q. When did you first talk to Wheelock about insurance on this vessel?

A. That was right after we took that bond.

Q. Right after you took the bond?

A. Or at the same time.

Q. All right. Where did you take the bond?

Where did you talk to him?

A. Where we talked to him?

Q. Yes.

A. In a fellow by the name of Landon's office.

Q. A fellow by the name of Landon? [103]

A. Yes.

Q. Who was Landon?

A. He is an attorney in this town.

Q. He was your lawyer in this matter, wasn't he? A. No.

Q. He didn't advise you on it with respect to this contract at all? A. No.

Q. And you didn't meet Wheelock in Landon's office, did you?

A. That is where I met him, yes.

Q. And it was there that you gave Wheelock the order for the performance bond and for the builder's risk insurance, wasn't it? A. Yes.

(Testimony of Oluf B. Hanney.)

Q. Now, that was in May of 1941, wasn't it?

A. I think it was, yes.

Q. Now, when was the next time you saw Wheelock?

A. Oh, I saw him several times probably after that. Maybe two or three times after then.

Q. When was the next time after that?

A. That I am not so sure.

Q. It was August 20, wasn't it?

A. I saw Mr. Wheelock before then.

Q. You saw Mr. Wheelock before that?

A. Yes.

Q. When was it?

A. Oh, I will say the first of July.

Q. Did you have any talk with him?

A. Yes. [104]

Q. What about?

A. About the insurance.

Mr. Stafford: I don't think I have any further questions.

Mr. Maloy: That is all, Mr. Hanney.

The Court: You may step down.

(Witness excused.) [105]

Mr. Maloy: Step forward, Mr. Duren.

H. T. DUREN,

Called as a witness on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Will you please state your name and your residence and business?

A. My name is H. T. Duren, and my residence is Tacoma, Washington, and my business is marine insurance.

Q. With what concern are you connected in the marine insurance business?

A. Hansen & Rowland.

The Court: May I ask the witness to spell his last name?

The Witness: (Spelling) D-u-r-e-n.

Q. (By Mr. Maloy): How long, Mr. Duren, have you been in the marine insurance business?

A. Seventeen years.

Q. Have you been with Hansen & Rowland during all that period of time? A. No.

Q. How long have you been with Hansen & Rowland? A. 13 years.

Q. Are you acquainted with Oluf B. Hanney, one of the Plaintiffs? [118] A. Yes.

Q. Are you acquainted with Hans Mikelsen, another of the Plaintiffs? A. Yes.

Q. And are you acquainted with Paul Vohl, another plaintiff? A. Yes.

Q. Were you acquainted with them in the early part of the year 1942? A. Yes.

(Testimony of H. T. Duren.)

Q. Mr. Duren, state whether they or either of them came to you at any time after February 24, 1942, in connection with presenting a claim on their behalf to the Franklin Fire Insurance Company?

Mr. Stafford: Just a moment, if your Honor please. The Defendant objects to the testimony called for by that question on the ground, first, that the policy and the construction contract and the admissions of record, which are now part of the record of this case, leave no ambiguity requiring explanation by parol evidence; second, because the evidence offered or called for by this question, even if admissible against the objection just stated, would not be material, relevant or competent in connection with the matters to be considered at this trial. In other words, my point on that last objection is that after the fire on February 24, 1942 had occurred, any action by the Plaintiffs could not possibly be material, relevant or competent to prove what the intention was in writing a policy which was issued on August 20, 1941, and particularly no transaction they may have had with Mr. Duren can conceivably relate to the question of intent at that [119] time.

The Court: Do you wish to make a statement, Mr. Maloy?

Mr. Maloy: Well, I didn't hardly believe it was necessary, but the purpose of this, of course, is to show that these men, after the fire,—

(Testimony of H. T. Duren.)

Mr. Stafford (Interrupting) Now, just a moment, Mr. Maloy. I don't think that a response to my objection calls for an offer of proof.

Mr. Maloy: I am not making any offer of proof. I am trying to advise the Court of our position in regard to the evidence which we are about to offer.

Mr. Stafford: I think that the objection can be responded to without going into the evidence to be offered by this witness.

The Court: The jury will temporarily retire.

(Whereupon, the jury retired to the jury room, and the following proceedings occurred without their presence and without their hearing:)

Mr. Stafford: I would like to be heard further.

The Court: I will hear you further. Have you any decisions of the State Supreme Court, or—

Mr. Stafford: I have no decisions on this point whatever. I don't think any are necessary, but I shall have Mr. Taylor prepare them if you think they are.

But here is my whole point, if your Honor please. [120] We, of course, are not relinquishing our position that there is no ambiguity and there is no requirement for parol evidence, but it is not to that objection that I am addressing these remarks.

My second objection is that, even assuming that the Court rules against me on my first objection

(Testimony of H. T. Duren.)

and holds that there is an ambiguity here which does require explaining by parol evidence, that this parol evidence, the evidence called for by this question, cannot possibly be admissible.

Why? If we have anything to try here, apart from the amount of damages—and I don't concede that we have—but if we have, it is the question of what constituted the subject matter of this policy. As Mr. Maloy puts it, what was the intent of these people?

Now, that can only mean what was the intent of these people at the time the policy was written.

All right. The policy is written, Hanney, Mikelsen and the policy itself all say on August 20, 1941. This gentleman has already stated, and Mr. Maloy's question asks what was done after February 24, 1942. By whom? By Hanney and Mikelsen with Duren.

Now, how in the world, if you Honor please—how, by any stretch of the imagination can a unilateral act by Hanney and Mikelsen, with a stranger to the entire transaction, have any competent or relevant or material bearing on the issue of what the intent of these parties was in August of 1941?

At most it can be a self-serving proposition. At most they can prove that Hanney and Mikelsen—and Mr. [121] Maloy indicated that in his opening statement—went to Duren, and Duren wrote a letter demanding payment.

Well, at the very most that is self-serving and objectionable on that ground only.

(Testimony of H. T. Duren.)

The Court: Now I will hear from the other side.

Mr. Maloy: Now, if it please the Court, let us suppose that the Plaintiffs had never presented any claim against the insurance company on this loss until they started suit. What would be the inference? It would be the inference that they didn't think they had any claim.

Now, this evidence is relevant to show their attitude, their conduct, their construction after the conversations which they have testified to regarding the issuance of the policy, and after the loss by fire, by first taking up with their insurance agent, Mr. Duren, who had become such, which will be shown, to present and write a letter or take it up with The Franklin Fire Insurance Company and see whether the insurance company was going to adjust this loss or pay this loss.

Now, that certainly corroborates and is relevant to corroborate the plaintiffs in their position that they have taken that there is liability under this policy and that this property was covered.

The Courts hold and the authorities hold uniformly that the acts and conduct of all the parties concerning the transaction are admissible.

Now, it also gives rise to an inference that what they have heretofore testified to in regard to the issuance of the policy and the coverage effected thereby [122] is the correct viewpoint and the facts of the matter.

The Court: Do you expect to have this witness

(Testimony of H. T. Duren.)

relate here on the witness stand before the jury what he told them?

Mr. Maloy: No, your Honor, I don't intend to go into any hearsay.

My question, if it please the Court, is directed as to whether they did come to him. Now, there can't be any hearsay on that. I am not asking what they said to him.

The Court: And did he take any action?

Mr. Maloy: Yes, he did. He took action.

The Court: I mean to say, do you intend to go further and ask him what if any action he took at their request?

Mr. Maloy: Exactly so, your Honor, and he took it up with the insurance company; and I want to prove what the insurance company did about it and the position of the insurance company now.

Now, as long as the jury is not present, I will just state further, I am not going to make this contention that the position they took constitutes a waiver or estoppel precluding them from taking the position they now take in this trial, because of a clause in their letter where they have made a reservation to the effect they could take any other position they wanted to; but I am sure your Honor is familiar with the rule of law that where an assured, after loss, makes a claim or presents proof of loss to the insurance company, and the insurance company denies liability on one ground, [123] they are estopped to deny on any other

(Testimony of H. T. Duren.)

ground, without a specific reservation. That is uniformly a well known law.

Now, we will show by this correspondence that Mr. Duren in a letter dated June 8 wrote The Franklin Fire Insurance Company presenting a claim and asking for adjustment on behalf of the Plaintiffs, and that the Fire Insurance Company on June 18, ten days later, wrote a letter to Hansen and Rowland attention of Mr. Duren, in which they denied liability on a ground that they do not insist upon at all at this time.

Now, certainly that is material for the consideration of the jury.

Mr. Stafford: Now, Mr. Maloy, that is exactly why I wanted the jury excused. You have conceded that the rule about a restricted denial of liability has no application in this case; yet you are trying to back that rule into this case and get it to the attention of the jury, and that is precisely why this question is very important.

The fact is, the letter that Mr. Maloy has referred to was written by The Franklin Fire Insurance Company Manager here, Mr. Cochrane, to Mr. Duren, and it very carefully stated that we do not regard—I am not attempting to quote it, but Mr. Maloy will agree that this is the substance, and he has it with him right there—we do not believe that this loss constitutes any claim under this policy, and we therefore reserve all rights and defenses under the policy regarding it.

The letter then goes on to say, "Without in

(Testimony of H. T. Duren.)

any way [124] waiving what we have already said, we wish to make the following comment," and then Cochrane goes on and comments on Mr. Duren's claim that the locker out here at Salmon Bay was exclusively the property of Hanney, Vohl and Mikelsen.

Now, of course, here is what Mr. Maloy is trying to do with this evidence. He is trying to get these letters in evidence. Why? His stated ground is in order to corroborate his own witnesses.

Now, this is a strange business where you put your own party on the stand, he testifies under oath, and then, before there is any impeachment, he is permitted to produce witnesses to corroborate what he said, to build up his character. That is the purpose of this. It has no relevance—

The Court: Well,—

Mr. Stafford: Wait until I finish, your Honor.

The Court: Very well.

Mr. Stafford: Now, having got it admitted on that ground, what does Mr. Maloy propose to use it for? Not to corroborate his witnesses at all. He proposed to argue to this jury that we in this letter denied liability on a limited ground, and are now denying liability on a different ground.

I think this is one of the most important questions of evidence that has come up in the course of this trial and I repeat my objection, that any act or transaction between Hanney, Vohl and Mikelsen, or any one or group of them, and Mr. Duren,

(Testimony of H. T. Duren.)

after the fire loss of February 24, 1942, cannot be regarded as evidence properly ad- [125] missible under any circumstances to prove what the intent of these parties was in August 1941 when this policy was written. I make that objection again without waiving the other objections.

The Court: Before you are seated, Mr. Stafford, suppose there was only one owner of this property, one insured, instead of three. Could that one insured after the loss have done these acts which are involved here in this proposed line of testimony, and after doing so, in litigation concerning the policy, could that insured have gone on the witness stand and been permitted to show what he did after the loss to present his claim to the Company under the policy?

Mr. Stafford: By all means, yes, your Honor: but—

The Court: Why can't he do it by his agent?

Mr. Stafford: He can't do it in this case either personally or by his agent. Why? Because in this case there is no issue to be submitted to the jury at all on the question of denial of liability.

The Plaintiffs have pleaded this contract as written. They have stated that they have had a loss and they have stated that we have denied liability, and we have admitted that we have denied liability.

Now, why should testimony be put in this record to show a denial of liability? There is no issue. Mr. Maloy by his own statement of record here

(Testimony of H. T. Duren.)

says the only issue for which he even contends, in addition to the amount of damages, is the question of intent when this policy was written.

So therefore the only evidence that your Honor can [126] admit properly is evidence which your Honor considers relates and has probative value on that question, on that question only; and I say this has no probative value and no relevance, no materiality and no competency, and is self-serving, to put this stuff in here after the loss for the sole purpose of twisting the matter before the jury. That is all it amounts to.

The Court: Do you wish to respond?

Mr. Maloy: Well, your Honor, I have never heard an argument in court before that you couldn't corroborate your own witnesses by relative circumstances. That is the way you corroborate your witnesses, to show that their acts are those which any probable or reasonable person would do under the same or similar circumstances.

Now, we are showing a course of conduct which they engaged in after the loss. It has been testified to already here by Mr. Mikelsen. They got no satisfaction from the insurance company, so then finally they discussed the matter with Mr. Duren.

I don't care to have the testimony of what was said, but they authorized Mr. Duren to present a claim and asked him to take it up with the insurance company, which he did.

Now, that is something that would be natural

(Testimony of H. T. Duren.)

under all the circumstances; and if this evidence isn't in the record, what is to prevent the defendant from arguing to the jury, "Now, why didn't they present a claim to the insurance company, and what kind of a claim did they present?"

There is no evidence in the record on that. Most [127] assuredly that is always material in a suit on an insurance policy.

We go further here, though. A claim was presented, broadly claiming liability on two grounds: First, that this property was in a dock or warehouse or building of the assured, under the second clause that it is material in this case, and also that the property lost or destroyed was intended for the vessel and covered by the policy.

All right. What kind of an answer do we get from the insurance company?

Now, we get an answer in which they deny liability on the ground that it wasn't in a building of the assured, because the Plaintiffs weren't the owners of the building.

Now, certainly, if they had any confidence in the position they are now taking, that under the first clause or the words "belonging and destined for the boat, Hull No. 20," is involved, that that was a valid ground for defense or denial of liability, they would have said so; and that certainly is a material circumstance to be considered in this case, and always has been in any suit that I ever heard of in a suit on a policy.

(Testimony of H. T. Duren.)

Now, when you get back to this proposition, Mr. Stafford switches from one point to the other. Now he is back on the proposition which your Honor has already overruled Counsel on, that is to say, the same question that was discussed on the summary judgment, the motion for summary judgment, and the same question that has [128] been discussed time and time again in various objections here, that there is no issue except the amount of the loss.

Now, your Honor has ruled, as I understand your Honor's ruling—and I think I am correct—that the intention of the parties is an issue in this case to be determined from all the circumstances, because the Circuit Court said that the contract was ambiguous.

Now, these are mere circumstances or facts from which inferences favorable to the Plaintiffs may rise, and we have the right to corroborate and sustain and prove our case by any fact from which any inference may be drawn which would be favorable to the Plaintiffs, and certainly this testimony will permit of the drawing of inferences, if not the establishment by direct evidence, of facts which are favorable to the Plaintiffs in this case, and tends to sustain their right of recovery here.

Mr. Stafford: Now, if your Honor please, Mr. Maloy has just come all the way and said that the answer of the fire insurance company to Mr. Duren's letter was a restricted denial of liability. I think

(Testimony of H. T. Duren.)

that I had better read that to you to impress upon you—

The Court (Interposing): It is agreeable for you to do that.

Mr. Stafford (Continuing): —to show you just how important this question is, and I might add the further objection to Mr. Duren's testimony in this respect, that Mr. Duren has now testified that he is a Marine Insurance man of 17 years' experience, and [129] with Hansen & Rowland 13 years. I thought that Mr. Maloy was calling Mr. Duren to qualify him as an expert witness, and now here is what happens: Mr. Maloy now tries to put this letter in evidence, and, of course, you will find that he will argue to the jury—and I think it may not be necessary for him to argue to the jury—here is Mr. Duren, a man of 17 years' experience, and let me read the Franklin Fire's answer, because I submit it is entirely improper or entirely incorrect to put this in evidence as bearing on the intent of those parties when they wrote this contract, and, of course, that must be the intent that controls. You can't change the intent after it is written.

Mr. Maloy: Do you mean to say, Mr. Stafford, that subsequent acts of the parties aren't admissible to establish what the intent was when the contract was written?

Mr. Stafford: Subsequent unilateral acts are never admissible to prove the intent of both parties.

Mr. Maloy: Well, suppose the Plaintiffs had said, "We don't make any claim under the policy."

(Testimony of H. T. Duren.)

You would certainly claim that, wouldn't you, if it took place after the fire?

Mr. Stafford: That would become admissible, and you know it, under an entirely different rule, and that would be under the rule permitting the admission of admissions against interest. It would have nothing to do with this question.

Mr. Maloy: I think there can be implied admissions as well as direct. [130]

Mr. Stafford: It would have nothing to do with intent.

The Court: You may proceed with the argument.

Mr. Stafford: One party to a contract can't, by a unilateral act, impose upon a contract and the other party to it any intention by that act. He can't change or affect the intention of both parties by some act he does by himself.

But now here is the letter. This is a letter to Mr. Duren. I shan't read the address. It is from the Franklin Fire Insurance Company. Incidentally, the date of that letter is June 8, 1942, that Mr. Duren wrote, and this one is June 18.

(Whereupon, Mr. Stafford read a letter which was later marked Plaintiffs' Exhibit 5 for identification.)

Mr. Stafford: Now, this letter refers to the words "in the construction" of Hull No. 20. That is also in Mr. Duren's letter, "in the construction." The admissions of record today are that none of this was intended for use in the construction. A totally different question was presented by Mr. Duren's

(Testimony of H. T. Duren.)

letter than is presented in this case, and it was this material and equipment which was destroyed by this fire.

Now, Mr. Maloy correctly stated the law when he opened this question, when he said that the rule which prohibits an insurance company, having made a restricted [131] denial of liability, from later denying liability on a different ground, has no application here. Mr. Maloy conceded that at the outset of his remarks; and if he hadn't he must anyhow, because there is a clear and well defined reservation of all rights under the policy by the Company.

But in addition to that, in Mr. Duren's letter of June 8, which is an interesting document——

The Court: I would urge you to apply as much brevity as you consistently can with your position.

Mr. Stafford: Well, I will do it, your Honor, but it is a matter of rather considerable importance, I think.

The Court: You may also have leave to make the record that you wish to make in this connection. All I ask of you is to do so in as expeditious a way as you can.

Mr. Stafford: I shan't read, unless your Honor would prefer that I do—I might just as well read the entire letter. This is the letter written by Mr. Duren to the Franklin Fire; I won't read the address and caption. It is dated June 8, 1942.

(Whereupon, Mr. Stafford read a letter

(Testimony of H. T. Duren.)

which was later marked Plaintiff's Exhibit 5
for identification.)

Mr. Stafford: There is the letter. There couldn't be anything more vicious under the rules of evidence than the last paragraph of that letter. It is an attempt [132] to get into evidence in this case, for an avowed purpose, material which cannot possibly have any bearing on the purpose. It is trying to get into evidence here Mr. Duren's opinion of the meaning of this policy, which is solely a question of law to be determined by this court; and it is an effort to get into evidence here a statement by Mr. Duren that some other company paid a similar claim. All of that is involved in this letter and all of it is objectionable; first, because a witness, even though he were qualified as an expert—which I don't think the record yet shows—has no right to express an opinion on the one legal issue that is before the Court. He can express an opinion on some fact, but his opinion on the interpretation of this policy is not admissible for any purpose in this trial, and this letter constitutes a clear expression of Mr. Duren's opinion as to the coverage afforded by this policy.

The Court: Do you have any authority which would support your position you are now taking, that because that letter contains in it some inadmissible matter, the Court must as a matter of law rule it all out where it contains some other that the Court might think—

(Testimony of H. T. Duren.)

Mr. Safford (Interrupting): I have no authority at hand on that, your Honor. I do take that position, and I take the additional position that, even though a portion of the letter might be held by your Honor to be admissible—which I, of course, contend it can't be—your Honor cannot permit the admission of the balance of it. [133]

Now, I contend that any testimony of any conduct between these parties is inadmissible, but I clearly maintain and think the letter clearly establishes its inadmissibility right in its four corners.

The Court: The last part of that letter, Mr. Maloy, I would like to hear your comment upon that, as to whether or not that doesn't render the whole of the letter inadmissible.

Mr. Maloy: That certainly cannot render the whole of the letter inadmissible for several reasons.

In the first place, let us assume that Mr. Mikelsen or Mr. Hanney or Mr. Vohl had written this letter, and they said, "It is our opinion that we are entitled to be paid under this policy," or words to that effect here. Suppose they had said, "It is my opinion that I am entitled to recover; but before going further, would like an expression from you of your ideas."

Now, certainly anything that they could have done in bringing home knowledge to the insurance company as to the position they took on the liability under this policy would be admissible. They are stating it to the insurance company.

Now, if they may state it, certainly Mr. Duren, who is their agent, may state it; but if that were

(Testimony of H. T. Duren.)

objectionable, there is no reason why the rest of the letter is not admissible.

Furthermore, I haven't read these letters for a long time, but after hearing them re-read by Mr. Stafford, your Honor can very well see other grounds for materiality and for its relevancy. Mr. Duren writes and [134] states the facts of what occurred and calls attention to the clause of buildings, work shops and so forth of the assured, and goes on to say that it is the assured's contention—that is, Mr. Hanney and the rest of them—that it was located in a rented building and was intended for the vessel under construction and covered by the policy.

The Court: Does anyone else have copies of those letters? I would like to be looking at them, myself.

(The two letters referred to were handed to the Court.)

The Court: I will say this. I believe, Mr. Maloy I won't be able to admit the last paragraph of this letter of June 8, and I am not going to admit any of it until I find some authority that supports the Court's admitting the good part and excluding the bad. Have you got any authority on that?

Mr. Maloy: No, your Honor.

The Court: I would like to see some before I do it. For the present you can inquire of this witness what the fact was with respect to his being engaged to present this claim and what he did in respect to it, without introducing the letters.

(Testimony of H. T. Duren.)

Mr. Maloy: I would like to have them identified and make up my record, your Honor.

The Court: The Court will give you that opportunity now. You can do it now if you wish.

Mr. Maloy: I think it ought to be made in the [135] presence of the jury.

The Court: Do you?

Mr. Maloy: As long as your Honor is going to exclude these letters, I think it all ought to take place before the jury.

Mr. Stafford: I certainly object to it taking place before the jury.

Mr. Maloy: I think it is all material. I think the jury is entitled to know the attitude of Counsel for defendant in regard to certain evidence that is profferred. I think it all should take place before the jury, as long as your Honor has announced you are going to exclude it. I haven't got time to find any authority during the trial of this case on this matter. I can't possibly get any authority on it, but I know that in my reading I have run across innumerable cases where such evidence has been introduced, but I can't lay my hands on them because I thought the rule was so well settled that there wouldn't be any question about it.

Now, I want to say this, in addition to what has been said heretofore, certainly the fact that a claim is made under this policy—suppose you would exclude the letter of June 8. Certainly the letter of June 18 written by the insurance company stating

(Testimony of H. T. Duren.)

their position is admissible under any and all circumstances, because, in the first place, they do not take the position as to the denial of liability that they take now, that is, with regard to the property, the hull, tackle, apparel, and so forth, belonging and destined for the vessel. [136] They don't mention that. That is in the nature of an implied admission. It must be considered as such.

All admissions do not have to be expressed, as your Honor well knows. Its acts, conduct and omissions under certain circumstances—failure to answer or silence and many other things constitute implied admissions, or a position taken constitutes an implied admission that something else which is asserted is true.

But in addition to that, even the clause which includes the words "of the assured," what position does the insurance company take as to that? They don't say that clause is not material or doesn't cover this loss, except upon the ground, they say, that Mr. Hanney and so forth didn't own the building, wasn't the owner of it, and then it says here, "Over which the assured has complete dominion."

We have already shown by the evidence that the Plaintiffs had complete dominion and control; in fact, exclusive control of the locker in which this property was stored. It was turned over by Mr. Stakset.

The Court: You will have a chance during the noon hour, possibly a few minutes, to see if you can find some authority that will permit you, by cover-

(Testimony of H. T. Duren.)

ing up a substantial portion of a communication, to have the remainder of the communication received in evidence as an act of a party or his agent; and I won't finally rule upon that until afterwards. I would think it would be better to save the two—how many letters are there, Mr. Maloy?

Mr. Maloy: Just the two letters, your Honor.

[137]

The Court: The letter from Mr. Duren and the response to it?

Mr. Maloy: Yes, your Honor.

The Court: The reply to it, and I will give you an opportunity after lunch to make your offer of proof in the usual way.

Mr. Stafford: Now, if your Honor please, I wish for the purpose of this record to make the point that, where evidence has been offered out of the hearing of the jury, which is inadmissible, and where the Court has found it to be inadmissible, the party against whom that testimony is offered is entitled to the protection of the Court against the offer of that evidence in the presence of the jury.

I don't think that we have to or can be compelled, in the face of clearly inadmissible evidence, to be required to now go before the jury and do this all over again.

The Court: I haven't ruled finally. What I have said may have seemed that the Court was indicating a final opinion. I now intend to modify what has previously been said to this extent, that the Court will postpone ruling upon this until after

(Testimony of H. T. Duren.)

the lunch period, with the hope that somebody in the case will be able to present to the Court, for the Court's assistance, some authority on whether or not a written document that contains some admissible matter and some inadmissible matter may, by having the inadmissible matter covered up so as to keep it from the view of the jury, be used and admitted for the admissible matter. [138]

Mr. Stafford: I assume your Honor will also listen to authority on the question of whether any letter written at that time is admissible at all?

The Court: Oh, yes, I will. Yes, I will hear any authority that you have to offer; but I will say this: It is very unfortunate to delay the trial for so many of these legal matters. It is too bad you couldn't have had some authorities lined up.

Now, yesterday Mr. Stafford accommodated the Court by bringing forward out of order a matter which he thought might need to be presented out of the presence of the jury, upon the Court's inviting him to do so, and also inviting Mr. Maloy to do so.

I will ask Counsel now, do you know of any other questions—can you now anticipate any other questions which are important, like both of you consider this, that are likely to deserve discussion out of the presence of the jury, and will you suggest them now if you think of any so that we can take this occasion now to do so?

The Court, like Counsel, desires to avoid all pos-

(Testimony of H. T. Duren.)

sible occasion for excusing the jury. It is inconvenient for the jury. It is inconvenient to Counsel and the Court. Can you think of any other such questions?

Mr. Stafford: Well, as far as the Defendant is concerned, the only one I can think of, if the Court please, is the matter of putting in evidence the admissions of Plaintiffs in response to the request for admissions by Defendant. I shall, of course, at the outset of my case, wish to put those in evidence before the jury. [139]

The Court: And will there be objection to that?

Mr. Maloy: At this time I don't believe there will be. I don't consider the admissions of any force or effect or to have very much bearing on the real issue in this case.

The Court: Can you think of any other?

Mr. Stafford: That is the only one I can think of offhand, except, of course, I can't guarantee what we are going to run into.

The Court: You, Mr. Maloy, do you anticipate that there will be any other matter of analogous importance to this?

Mr. Maloy: I can't anticipate what Counsel will object to, because he objects to everything. I will say this for the information of the Court, that I shall endeavor to put some expert testimony on this afternoon or sometime, as soon as we can get to it, if we ever can, regarding value of this property, to which I presume there will be obstreperous objection. So there may be that question. I may want

(Testimony of H. T. Duren.)

to propound hypothetical questions or I may want to propound questions based upon testimony already in the record in regard to the nature of this property and its condition and the care which was given it and so forth.

Mr. Stakset's deposition goes into that very thoroughly as to the condition of the property and the care that he gave to it and so forth; and outside of that, I can't think of anything else.

The Court: Have you any objection to expert testimony of one whose qualifications are properly established [140] testifying as to the meaning of this language the appellate court thought was——

Mr. Maloy (Interrupting): Oh, no, that isn't what I am going to put expert testimony on for, your Honor.

Mr. Stafford: I most certainly do.

Mr. Maloy: I am not going to offer any testimony on that.

The Court: I misunderstood the reference, then.

Mr. Maloy: Only expert testimony, your Honor, on the value of personal property destroyed. I shall not offer any expert testimony as to the interpretation of the contract.

The Court: Very well. Mr. Stafford, did you hear the statement of Counsel as to what the expert testimony would relate to?

Mr. Stafford: Yes, regarding the value of the destroyed property.

The Court: Have you any objection? Do you

(Testimony of H. T. Duren.)

hope yourself to offer similar testimony of a similar nature?

Mr. Stafford: I haven't decided. I want to see what happens. I have prepared for such a situation, yes.

The Court: Do you admit that such testimony is competent if the qualifications of the witness are established? You have no objection to the principle of expert testimony on the value of this peculiar kind of personal property?

Mr. Stafford: Not properly offered.

The Court: Very well. Now, do you think of anything [141] else, gentlemen? I wish to recall the jury and proceed now. Was there any other subject?

Mr. Stafford: Well, what is going to be done as far as Mr. Duren is concerned upon the return of the jury, in view of your Honor's reserved ruling?

The Court: The Court will permit oral questions to be asked of this witness as to the fact or not of his being retained to present this claim and what he did about it.

I will ask Counsel for the Plaintiffs to omit reference to the letters until after lunch, at which time the Court will make a decision, after receiving such aid as you can give the Court with such authorities as you may find during the noon hour.

Mr. Stafford: Can it be agreed that the objection which I have already stated can go to the

(Testimony of H. T. Duren.)

further testimony of Mr. Duren without constantly repeating it?

The Court: If Counsel so agrees, it may.

Mr. Maloy: I don't think I can agree any more, your Honor. Counsel will have to make his objections as we go along.

The Court: Very well, then. No agreement. I didn't finish my statement. I asked Counsel for the Plaintiffs to refrain from mentioning the two letters until after lunch.

Mr. Maloy: I will.

The Court: At which time I will give Counsel an opportunity to make his record; after, as I say, I have had and considered such advice as Counsel may have touching the authorities. [142]

I think, in view of that fact, we had better arrange to meet at a time before the jury is required to be in the courtroom, so as to try to avoid that occasion of excusing the jury. I will make that convenient to Counsel.

Mr. Maloy: If I am to try to find authority, or get somebody to do it for me during the noon hour, I certainly wouldn't want the noon hour shortened any.

The Court: I will try to accommodate Counsel. I will try to accommodate Counsel. You may have to work later this afternoon.

Now, is there anything else that you wish to speak of?

Bring in the jury.

(Whereupon, the jury returned to the jury

(Testimony of H. T. Duren.)

box, and the following occurred within their presence and within their hearing:)

The Court: Let the record show all the jurors returned to their places as before. You may proceed.

Mr. Maloy: Could we have the last question, Mr. Reporter?

(Whereupon, the last question was read.)

Q. (By Mr. Maloy): You may answer that, Mr. Duren. [143]

Mr. Stafford: Just a moment. In view of the fact that it is necessary for me to make objections as we go along here, I object to that on the ground there is no ambiguity requiring parol evidence, and on the further ground that the evidence elicited by that question is incompetent, irrelevant and immaterial on the question of the intent or any other question involved in this trial.

The Court: The objection is overruled.

Q. (By Mr. Maloy): Answer the question, please, Mr. Duren. A. They did.

Q. Can you state about when it was?

Mr. Stafford: The same objection.

The Court: Overruled.

A. As I recall, sometime in April.

Q. Of that year?

Mr. Stafford: The same objection.

The Court: Overruled.

A. Well, as I recall, it was '42.

Q. By the way, in that connection, had you at

(Testimony of H. T. Duren.)

or about that time written any marine insurance for them?

Mr. Stafford: The same objection, plus the additional objection, if your Honor please, that that is clearly irrelevant and immaterial.

The Court: Repeat the question, please.

(The question was read by the reporter.)

[144]

The Court: That is sustained.

Q. (By Mr. Maloy): Did you, upon their behalf, present a claim to the Defendant, Franklin Fire Insurance Company, in connection with the fire that took place on February 24, 1942?

Mr. Stafford: The same objection, your Honor; not only the one made to the last question, but to the two preceding questions.

The Court: Overruled.

A. I did.

Q. (By Mr. Maloy): In what manner did you do it? Personally or by writing?

Mr. Stafford: The same objection.

The Court: Overruled.

A. I did it both personally and by writing.

Q. And in what manner did you do it personally?

Mr. Stafford: The same objection.

The Court: Overruled.

A. By discussion of the facts of the case with the manager of the company in his office in Seattle.

Q. And who was that?

Mr. Stafford: The same objection.

(Testimony of H. T. Duren.)

The Court: Overruled.

A. Mr. Cochran.

Q. (By Mr. Maloy): When was that? [145]

Mr. Stafford: The same objection.

The Court: Overruled.

A. That was during the month of May, I believe.

Q. Was it before you presented any claim on behalf of the Plaintiffs to the Franklin Fire Insurance Company in writing?

Mr. Stafford: The same objection.

The Court: Overruled.

A. It was before.

Q. Did Mr. Cochrane, representing the fire insurance company, admit or deny liability upon that occasion?

Mr. Stafford: Now, if your Honor please, I object to that for the reasons already given, plus the additional reason that it is calling for the conclusion and opinion of the witness, since no proper foundation has been laid.

The Court: I think it calls for a conclusion. On that ground it should be sustained.

Q. (By Mr. Maloy): What did he say in regard to the claim that was presented by you personally, Mr. Duren?

Mr. Stafford: I wish to object to that for the reasons given to the other questions, with respect to the lack of an issue calling for parol evidence, and for the lack of relevancy, materiality or competency.

(Testimony of H. T. Duren.)

The Court: The objection is overruled. You may state.

A. Well, as I recall, Mr. Cochran didn't commit himself one [146] way or the other.

Mr. Stafford: Now, just a moment. If your Honor please, I move that that answer be stricken because it is not responsive.

The Court: It is stricken.

Mr. Stafford: He was asked what Mr. Cochran said.

Q. (By Mr. Maloy): Well, did he deny liability at that time?

Mr. Stafford: I object to that as calling for an opinion of the witness and a conclusion.

The Court: The objection is sustained. You can say what he said.

Q. What did he say, then?

The Court: If you recall.

Mr. Stafford: The same objection.

The Court: The objection is overruled. He may state what he said if he recalls what he said.

Mr. Stafford: Including an objection on the grounds of violation of the parol evidence rule.

The Court: That is overruled.

A. Well, as I recall, Mr. Cochran told me that he didn't consider the claim admissible under the policy, but that he would give the matter consideration and that I was to write him.

Q. Then, pursuant to that conversation, did you later on write him?

(Testimony of H. T. Duren.)

Mr. Stafford: The same objection, if your Honor [147] please.

The Court: The objection is overruled.

A. I did.

Mr. Maloy: I think, your Honor, that I would like to have these letters identified, because I think Mr. Duren wants to get back to Tacoma; and if we can have these identified—

The Court: I will have to ask him to return after lunch.

Mr. Maloy: Will you?

The Court: Yes, and the witness is directed to be here at two o'clock.

Mr. Maloy: I am only trying to accommodate Mr. Duren. I think that is all, Mr. Duren, at this time.

The Court: You may cross-examine.

Mr. Stafford: Well, I think, in view of the fact that Mr. Duren is to return at two o'clock.—

The Court: (Interrupting) You should cross-examine now, if you wish at all, concerning the matters inquired into up to this time.

Mr. Stafford: Well, I still must maintain that I have a right to reserve my cross examination until the witness—I have no questions at this time.

The Court: The Court does not deny you the right to cross-examine as to anything that may be developed when the witness returns after lunch. The Court directs, if you wish to cross-examine as to anything that has occurred up to this time, that you now proceed to do so. [148]

(Testimony of H. T. Duren.)

Mr. Stafford: No, but, if your Honor please, so that the record may show it, whether or not it will be desirable for me to cross-examine as to what has already occurred may very well depend upon what occurs after lunch. Therefore, I ask that I be permitted to reserve my right to cross-examine this witness until after the witness has finished.

The Court: That request is denied, upon this condition, that after lunch, if it occurs that there is something that develops then for the first time that makes it desirable for you to cross-examine, when you didn't need to now, the Court will consider that.

Mr. Stafford: That is entirely agreeable. I have nothing at this time. If there is something occurs later, I want the right to go over this. I have no questions at this time.

The Court: Very well, you may step down, and be here at two o'clock, will you? Remain in attendance until further excused by the Court.

(Witness excused.)

Mr. Maloy: I would now like to read the deposition of Henry Stakset.

The Court: You may proceed.

Mr. Maloy: I wish the record to show, your Honor, that this deposition of Henry Stakset was taken at the instance of the Defendant, as a witness on behalf of the Defendant, which the Plaintiff is now reading.

Mr. Stafford: Now, if your Honor please, I move [149] that that remark of Counsel be stricken.

The Court: The motion is denied.

Mr. Stafford: That is an entirely improper remark, if your Honor please.

The Court: I believe the Court has already ruled, Mr. Stafford. Isn't the record complete enough?

Mr. Stafford: I don't think it is.

The Court: I will hear you, then, some other time in the absence of the jury, if you will remind me of it, and I will be glad to consider any authorities that you may then wish to bring to the Court's attention.

Mr. Stafford: Shall we start?

The Court: You may proceed.

Mr. Stafford: Shall we start from the beginning?

Mr. Maloy: I think so. We only got three or four questions read yesterday.

The Court: Page 3, was that the one?

Mr. Maloy: Yes, page 3, your Honor.

The Court: You may proceed to ask the questions, will you, please, Mr. Stafford.

(Mr. Stafford read the questions and Mr. Maloy the answers from the deposition of Henry Stakset, as follows:)

HENRY STAKSET,

testified by deposition as follows:

“Q. Your name is Henry Stakset, is it?

“A. That’s right. [150]

“Q. What is your business?

“A. Fishing.

“Q. Fishing business? A. Yes.

“Q. Where do you live?

“A. I live in Tacoma.

“Q. Tacoma, Washington? A. Yes.

“Q. Are you about to go to sea?

“A. Yes, I figure to go out tomorrow.

“Q. How long have you been in the fishing business?

“A. Oh, since I was sixteen.

“Q. Have you lived up around the Puget Sound most of your life?

“A. No. I lived there about, pretty near twenty-three years now.

“Q. Do you remember selling some equipment belonging to a fishing boat to Oluf Hanney and Hans Mikelsen? A. Yes.

“Q. When did you sell it to these men?

“A. That was in 1941, the fall.

“Q. The fall of 1941? A. Yes.

“Q. At the time of the sale you made a list of the equipment that was being sold? A. Yes.

“Q. Mr. Whelan has handed me a typewritten list, here, of equipment which apparently bears your signature on each page. I show it to you. Do you recognize your signature on those pages? [151]

“A. Yes, that is my signature, all right.

(Deposition of Henry Stakset.)

“Q. On the second page, too? A. Yes.

“Q. Is that the equipment that you sold these two men?

“A. Yes. Do you want me to read it over?

“Q. Yes. A. That is the list, yes.

“Q. How much did you sell that equipment for to these two men, Hans Mikelsen and Oluf Hanney? A. \$4000.

“Q. Where was it at the time it was sold?

“A. It was in a locker in the Fishermen’s Dock, there, in Seattle.

“Q. Is that the Salmon Bay Terminal?

“A. Yes.

“Q. You had stored it there, had you?

“A. Yes.

“Q. How long had it been in storage?

“A. Oh, when they bought it it was about six or seven months.

“Q. That would be, then, in the spring of 1941 that you put it in storage? A. Yes.

“Q. Why did you put it in storage?

“A. Well, we didn’t use it then, and it had to be taken care of, salt it down and hang up the lines so it will keep.

“Q. Had you had it on a boat? A. Yes.

[152]

“Q. You had a boat, and you took it off the boat? A. Yes.

“Q. What was the name of your boat?

“A. Midnight Sun.

“Q. Did you own that boat?

(Deposition of Henry Stakset.)

“A. I owned part of it, yes.

“Q. How old was the boat; when was the boat built? A. In 1937.

“Q. 1937? A. Yes.

“Q. Had you been fishing with that boat from 1937 until the time you took it off and stored it?

“A. Yes; every winter down here, every season down here.

“Q. That is, down outside of San Francisco Bay? A. Yes.

“Q. What is the fishing season outside of San Francisco Bay?

“A. Well, start here in August or September, and last for up to February of next year.

“Q. What kind of fishing was that?

“A. Sardine fishing.

“Q. Did you fish during that season which began in September, 1937?

“A. Not at the beginning. The boat was not quite ready and we start in the later part of September or the first of October.

“Q. Of 1937? A. Yes.

“Q. At the end of the season, in February, 1938, you [153] went back to Tacoma?

“A. Yes.

“Q. Then did you fish in the season which began in September of 1938? A. Yes.

“Q. Then returned to Tacoma in February of 1939? A. Yes.

“Q. Did you fish in the season beginning September, 1939?

(Deposition of Henry Stakset.)

“A. Yes, not at the beginning, probably the later part of September.

“Q. The latter part of September.

“A. Yes.

“Q. And then went back in February of 1940?

“A. Yes.

“Q. 1940? A. 1940, yes.

“Q. Did you go back to Tacoma in, say, February, 1941? A. Yes.

“Q. That is when you put this gear that was sold in storage? A. Yes.

“Q. Did you fish in 1941? A. No.

“Q. From this boat? A. No.

“Q. What happened to your boat?

“A. The Government took it; sold it to the Government.

“Q. The Government requisitioned your boat, did it? [154]

“A. Well, it took it.

“Q. What did you do with your boat between these fishing seasons that you described?

“A. Chartered it out in the summer time.

“Q. Chartered it out? “A. Yes.

“Q. Did you charter it out each summer?

“A. I don't remember. I chartered them out two summers.

“Q. Two summers?

“A. Yes; I remember two summers.

“Q. Do you remember where your boat was built?

(Deposition of Henry Stakset.)

“A. At Tacoma Boatbuilding Company, Tacoma.

“Q. The boat was delivered to you about August of 1937, was it?

“A. Yes, the later part of August.

“Q. Did you outfit the boat for fishing that season yourself? “A. Yes.

“Q. When you first outfitted the boat, did you have equipment on the boat substantially what is shown here on this list?

“A. Well, just about the same, yes.

“Q. Just about the same?

“A. Just about the same, yes, a little more later on, I guess.

“Q. A little more later on? “A. Yes.

“Q. I will draw your attention to this entry of 175 Montara bags and rubber; did you have those on board [155] the first season, 1937?

“A. No, not the full amount there.

“Q. When did you get the rest of the bags?

“A. I don't know; in 1938 and 1939.

“Q. 1938 and '39? “A. Yes.

“Q. What are those bags made of?

“A. Well, the inside is rubber and outside is covered with canvas.

“Q. What are they used for? “A. Floats.

“Q. Used for floats? “A. Yes.

“Q. Do they help with the corks?

“A. Yes.

“Q. To keep the seine afloat?

“A. Yes.

(Deposition of Henry Stakset.)

“Q. From year to year you replenished those items, that equipment, from time to time?

“A. Yes.

“Q. What I am getting at is, the first year you had substantially the same equipment on board as is shown by that list, with the exception of the Montara bags? “A. Yes.

“Q. The Montara bags, you got some more, some additional ones, more than you had the first year, and you got those in 1938 and 1939?

“A. Yes.

“Q. Were there any other things that you added sub- [156] sequent to 1937 besides the Montara bags; I mean additional equipment that was just not replacements?

“A. Well, replaced it. I put a little more—got the seine a little deeper, a little bit longer.

“Q. How much additional seine do you think you put on?

“A. About, probably 20 percent.

“Q. Probably 20 percent. Each year you went out fishing and before you went out and during the season you would buy replacements as they were necessary, would you? “A. Yes.

“Q. Where did you make those purchases in 1937?

“A. I bought most of the seine and corks and leads from Lindgren.

“Q. Was that up in Seattle?

“A. In Seattle, yes.

(Deposition of Henry Stakset.)

“Q. Was the seine of American manufacture that you bought from Lindgren?

“A. No, it was Japanese web.

“Q. Japanese web? “A. Yes.

“Q. Is that as good as American web?

“A. No, it is not as good as American web.

“Q. Where did you buy the other stuff that you outfitted your boat with?

“A. Later on I bought from Pacific Marine, Nordby Supply Company, and Seattle Ship Supply Company, in Seattle.

“Q. All those concerns are in Seattle?

“A. Yes. [157]

“Q. Did you buy from these concerns the first year, in 1937?

“A. I might have bought a little.

“Q. Most of the stuff you bought the first year from Lindgren? “A. Yes.

“Q. The following years, as you needed replacements you bought from these other concerns up there? “A. Yes.

“Q. When you are down in San Francisco during the fishing season, when you were down here, did you buy anything in San Francisco?

“A. Yes, I bought from Cincotta Bros.

“Q. The stuff you bought from Cincotta Bros. was replacement, and so on? “A. Yes.

“Q. How much did the original outfit cost; I don’t mean the boat, I mean the original outfit of seines, and corks, and leads, and gear that is comparable to this that is on the list, here.

(Deposition of Henry Stakset.)

“A. Well, I cannot say exactly, but the first year it cost around eight thousand, I guess.

“Q. About eight thousand?

“A. Yes.

“Q. How much did your boat cost, do you remember? Or, how much did your total investment amount to? “A. About \$43,000.

“Q. \$43,000? “A. Yes.

“Q. How much did your boat cost? [158]

“A. I believe it was around \$36,000.

“Q. \$36,000? “A. Or \$35,000.

“Q. \$35,000 or \$36,000? “A. Yes.

“Q. So your seines and nets and your corks and the rest of the equipment cost in the neighborhood of seven or eight thousand dollars?

“A. Yes.

“Q. You used this boat and its equipment every season from 1937 to 1940, inclusive?

“A. Yes, that's right.

“Q. Did you make any large purchases of equipment after the original season of 1937?

“A. Well, the Japanese web wasn't very good. In 1938 and 1939 I bought quite a bit replacements.

“Q. Of netting? “A. Netting, yes.

“Q. You would not buy it all in one year, though? “A. No.

“Q. You bought some in 1937 and some in 1938?

“A. 1938 and 1939.”

Mr. Stafford: The next one doesn't make sense. It says “1939 and 1939.” I guess it meant 1938 and 1939.

(Deposition of Henry Stakset.)

“Q. And the last purchases you made in the way of replacements were during the season of the fall of 1940? “A. Yes.

“Q. When you store this equipment what means are [159] used to preserve it during storage?

“A. Well, the netting is salted down, use about eight or nine tons of salt on the webbing; the lines and corks we hang up to dry.

“Q. Do you salt it down with a salt brine?

“A. No.

“Q. I mean the webbing.

“A. No. Haul it through a salt brine.

“Q. Salt brine?

“A. Cover it with salt, you can’t see the webbing.

“Q. How long do you think the netting will keep salted down that way?

“A. Well, I haven’t tried, but in one year I don’t think it would do any damage for one year.

“Q. That depends on whether or not it is covered with salt and brine? “A. Yes.

“Q. If you have dry spots on it, what happens then?

“A. Well, probably it gets hard, you see, and break out there where there is no salt.

“Q. How long was the life of the nets that you were using from 1937 to 1940?

“A. Well, all the time, if you take care of it, say about four or five years?

“Q. Then it is gone? “A. Yes.

“Q. And you have to replace? “A. Yes.

(Deposition of Henry Stakset.)

“Q. I notice on this list some mattresses, were those part of the original purchase? [160]

“A. Yes.

“Q. That is the original year of 1937, mattresses? “A. Yes.

“Q. Can you identify anything on that list that I have handed you and which you have identified, yourself, can you pick out any of the things there that were new as late as 1940?

“A. There is one item here, 350 fathoms.

“Q. Of what?

“A. 5/8 galvanized purse wire.

“Q. That was bought in 1940? “A. Yes.

“Q. Can you pick out anything else that was bought as late as 1940?

“A. There is a strip of netting here, I don’t know if it was bought in 1940, but it wasn’t used.

“Q. What is that?

“A. That is 160 fathoms of 1 $\frac{3}{8}$, 9-thread, 400 mesh.

“Q. That is netting? “A. Yes.

“Q. That had never been used? “A. No.

“Q. Is that the item where on that line the pencil notation, “New” is after it?

“A. Yes, I think so.

“Q. Is that your handwriting, do you know?

“A. I can’t tell.

“Q. Do you recognize any other item on that list that was new in 1940?

“A. Well, I can’t remember; there are so many things [161] here that I can’t remember.

(Deposition of Henry Stakset.)

“Q. You don’t recognize anything more on there that was new as late as 1940?

“A. No, not on that list, there.”

Mr. Stafford: The list was then offered in evidence, and it would probably be proper to advise the jury that this is the list that is already introduced.

Mr. Maloy: Yes, that is Plaintiffs’ Exhibit No. 2, the inventory, that was offered as part of this deposition also.

Mr. Stafford: That is the same list that they were talking about here.

Mr. Maloy: Yes.

Mr. Stafford: Shall I proceed?

Mr. Maloy: Yes, please.

“Q. How big was the *Midnight Sun*?

“A. Over all, she was 78 feet long.

“Q. Is that what you call one of the big boats in the fishing business?

“A. Yes. Not the biggest, but one of the big ones.

“Q. What percentage do you think of the big boats, that is, the size of the *Midnight Sun*, did the Government take when they requisitioned your boat, or about that time?

“A. Well, I can’t tell that.

“Q. Do you think they took one-half of them?

“A. No, not her equipment.

“Q. Those that were in operation had already their equipment, didn’t they? [162]

“A. Those that were in operation had, yes.

(Deposition of Henry Stakset.)

“Q. And the gear that you sold, covered by this Stakset Exhibit 1, you didn’t have any sale for it, except to somebody who had a new boat?

“A. Well, I think we could sell it to the other boats, too; it was hard to get webbing at that time, and they were around asking for webs; it was hard to get webbing at that time.

“Q. Could you sell all of it to one buyer or would you have to sell it piecemeal?

“A. Well, they asked for pieces but we want to sell nothing except the whole thing.

“Q. They were mainly interested in the netting? “A. Yes.

“Q. In your opinion, what was the second-hand value of this equipment that you sold and that is represented by Stakset Exhibit 1, at the time of the sale?

“A. Second-hand, it was worth about seven or eight thousand dollars second-hand.

“Q. You sold it for \$4,000. “A. Yes.

Cross Examination

“Q. Mr. Stakset, how old are you?

“A. 37.

“Q. Did I understand you to say you have been a fisherman since the time you were 16?

“A. Yes.

“Q. Have you ever owned any other fishing vessels [163] besides the *Midnight Sun*?

“A. Not in this country.

“Q. Where did you own them?

“A. In Norway.

(Deposition of Henry Stakset.)

“Q. How many vessels did you own?

“A. I had a part in two.

“Q. Were they vessels the same size as the Midnight Sun? “A. A little smaller.

“Q. Were you the master and skipper of those?

“A. No, I was not skipper there.

“Q. How long did you own these other vessels?

“A. The first one I had for two years.

“Q. In what year was that?

“A. That was in 1917 and 1918.

“Q. 1917 and '18?

“A. Yes. The other one I had in 1919 to 1923, when I left.

“Q. You were familiar with the fishing gear and other equipment on these vessels? “A. Yes.

“Q. You saw the fishing gear and equipment on these vessels? “A. Yes.

“Q. What year was the fishing vessel *Midnight Sun* built? “A. In 1937.

“Q. You bought it the same year?

“A. Yes. It was ready the later part of August or September.

“Q. Did I understand you to say it was built at [164] Tacoma Shipping Company?

“A. Tacoma Boatbuilding Company.

“Q. Did you have other partners?

“A. Yes; we were nine other partners.

“Q. What part of the year 1941 did the United States take the fishing vessel, the *Midnight Sun*?

“A. That was in the spring.

(Deposition of Henry Stakset.)

“Q. At the time the United States took your fishing vessel, how much did it pay you and your partners?”

Mr. Maloy: There is an objection.

“A. \$42,400, I think.

“Q. That amount did not cover the gear or other fishing equipment on the vessel, did it?

“A. No.

“Q. Mr. Stakset, do you recall what part of the year 1941 you sold the gear of the vessel *Midnight Sun*?

“A. It was in August or September.

“Q. You sold it to Mr. Mikelsen and to Mr. Hanney? “A. Yes.

“Q. How much did you receive for the fishing gear at that time? “A. \$4,000.

“Q. This gear had been stowed in locker 325 at the Salmon Bay Terminal at the port of Seattle?

“A. Yes, that was the number.

“Q. At the time of the sale you had a key to this locker?”

Mr. Stafford: Now, if your Honor please, I would like to switch roles at this point and suggest that there [165] is no point in putting in evidence any testimony regarding the ownership of Locker 325 at Salmon Bay Terminal, because that is all admitted. There is no issue regarding it and it is just a waste of time to put it in. The Defendant admits the stuff was in 325 and that the Plaintiffs had control of that locker.

(Deposition of Henry Stakset.)

The Court: Is there any purpose other than that?

Mr. Maloy: Well, I think not, but I think the testimony ought to go in. While it may be admitted by the Defendant that we had exclusive control of that locker, it seems to me that it would be material.

The Court: On what issue is it?

Mr. Stafford: It is a complete waste of time. The issue is admitted. The jury can't be interested in it.

The Court: If it were something other than a deposition—

Mr. Maloy: Well, I don't care. If it is admitted that they had exclusive control of the locker and had the key to it, I don't care whether you answer those two or three questions there or not.

Mr. Stafford: I am making no admissions other than those already in the pleadings. I am making that objection, that there is no issue on this question to go to the jury at all, and we are just sitting here wasting time.

Mr. Maloy: Well, you have wasted more time in making the objection than it would take to read the two questions and the two answers, so that can't be the reason for it.

The Court: Both Counsel will kindly just state the [166] objection. Do you insist upon proceeding with the reading of it, Mr. Maloy?

Mr. Maloy: Yes, your Honor, I think it should be read.

(Deposition of Henry Stakset.)

The Court: You may proceed.

"A. The watchman on the dock had a key in his office there.

"Q. Did you have that key transferred over to Mr. Mikelsen?

"A. Yes. I told him to get the key from the watchman when he needed it.

"Q. You were very anxious to dispose of this fishing gear, weren't you?"

Mr. Stafford: Now, objection was made at that time by Mr. Mackey representing the Defendant, that the question called for testimony that was incompetent, irrelevant and immaterial.

The Court: What boat or gear does that concern?

Mr. Maloy: The gear involved here, your Honor.

The Court: The objection is overruled.

"A. Well, I couldn't get another boat. I figured it might get lost, it wouldn't do it any good laying out that way for any length of time, and I would like to sell it, yes.

"Q. You knew at that time, prior to the sale of this fishing boat, that you would be unable to get another fishing boat, didn't you?

"A. Yes. [167]

"Q. You also knew you would be unable at the particular time, due to shortage of material, to build another fishing boat? "A. Yes.

"Q. How many discussions did you have with Mr. Mikelsen and Mr. Hanney prior to the sale of this fishing gear?

(Deposition of Henry Stakset.)

“A. I can’t remember that.

“Q. Was there one, or several conversations?

“A. Several, I guess.

“Q. At these discussions you knew that they wanted this particular gear that they were buying from you, that is, the gear on the list that we have already identified, and which has been admitted as Stakset Exhibit No. 1, for another fishing vessel which Mikelsen and Haney were building in Tacoma, didn’t you? “A. Yes.

“Q. The amount of \$4,000 which you received from Mr. Mikelsen and his partner did not represent the true value of this fishing gear at the time you sold it in August, 1941?”

Mr. Stafford: Mr. Mackey made an objection to that question, your Honor, and I think that I should have it appear that the objection is restated at this time. He objected to that on the ground that the fact that they sold it for \$4,000 is the best evidence of its value at this time, and I would like the Court to rule on that at this time.

The Court: The objection is overruled.

“A. No. It was worth more than we got for it.

[168]

“Q. Well, it was due to the fact you couldn’t—

“A. I couldn’t get a boat, so it was better to get some money for it or it probably would spoil.

“Q. Now, referring to this cotton netting or webbing that is set forth on this list that you have already examined, Mr. Stakset, you say that this

(Deposition of Henry Stakset.)

netting was bought at the time that you got the vessel in 1937; is that correct?

“A. No; very little of that netting on the list was bought in 1937.

“Q. Was the original netting Japanese netting?

“A. Yes, the first one was.

“Q. Whom did you buy it from?

“A. John Lindgren.

“Q. How long did this netting last?

“A. The first one?

“Q. Yes, the first one.

“A. We didn’t use much of it the second year. We used probably only half of it the second year.

“Q. But you had to start making replacements of that netting, didn’t you? “A. Yes.

“Q. You made those replacements in 1938 and 1939? “A. Yes.

“Q. What was the price of the netting at that time, during 1938 and 1939 when you were buying this netting?

“A. It was around 80 cents a pound.

“Q. From whom did you buy the new netting?

“A. I bought most of it from Pacific Marine and then I bought some from Nordby and some from Seattle [169] Ship Supply.

“Q. Did you buy any of it from Cincotta Bros.?

“A. Yes, down here.

“Q. This new webbing was replaced and repaired from time to time during 1938, 1939 and 1940, wasn’t it? “A. Yes.

(Deposition of Henry Stakset.)

“Q. Did you use tar or other materials to keep this webbing in first class condition?

“A. Yes, used tar, coal tar.

“Q. How often was it tarred to keep it in good condition?

“A. Put it on once when it was new.

“Q. Did you put it on at regular periods of time when you finished fishing?

“Mr. Mackey: I object to that on the ground he put it on once when it was new. He has already testified that is when he put it on.

“Mr. Whelan: I want to know if he put it on afterward, though.

“Mr. Mackey: He said he put it on once when it was new.

“The Witness: When it was new, yes, that's right.

“Q. After a year's period elapsed did you put any tar or any other material on this webbing to keep it in first class condition?

“A. Tried once what they call net dip; that's about the same as coal tar.

“Q. Did you put any tar on it during the year 1940 after your fishing season?

“A. That I can't remember. [170]

“Q. Did you put it on prior to your fishing season?

“A. I put once on; I think it was 1939 I put some on.

“Q. But at all times from the time of the pur-

(Deposition of Henry Stakset.)

chase in 1938 and 1939 you kept this webbing in first-class condition of repair or replacement?

“A. Yes.

“Q. How much time did you put in repairing this webbing?

“A. The whole crew was working on the gear; I can’t say the hours.

“Q. Did you put in several hours a day?

“A. To hang the seine up took about ten or twelve days, twelve men.

“Q. How many barrels of tar did you use each year on this webbing?”

Mr. Maloy: I think that question was withdrawn, and the question should be the top of page 20.

“Q. How many barrels of tar did you use the first time?

“A. About ten or twelve barrels of tar for the full seine.

“Q. Do you know, Mr. Stakset, what the price of webbing was in the year 1940?”

Mr. Maloy: Then that wasn’t answered.

“Q. On this list, Mr. Stakset, there is mention of a lifeboat; was this part of the original gear of the *Midnight Sun*? “A. Yes.

“Q. And between the years 1937 and 1939 did this [171] lifeboat become battered?

“A. Yes, it got smashed up.

“Q. Did you fix this lifeboat by putting in new planks and new sides? “A. Yes.

“Q. Did you paint it at that time?

(Deposition of Henry Stakset.)

“A. Well, we put linseed oil on it.

“Q. Was the lifeboat kept in good condition?

“A. Yes, it was just as good as new.

“Q. Did you put linseed oil on it each year after that?

“A. Yes, every year.

“Q. So in 1941, August, at the time you sold the fishing gear and other equipment to Mikel-sen, this lifeboat was in first-class condition, wasn’t it? “A. Yes.

“Q. Mr. Stakset, I believe you have testified that several items on this list, including 350 fathoms of 5/8 galvanized purse wire was brand new; is that correct? “A. That is correct.

“Q. Is it also correct that that wire had never been used? “A. That is correct.

“Q. And you have also testified that 160 fathoms of 1-3/8 9-thread netting was also brand new, is that correct? “A. That is correct.

“Mr. Mackey: For identification, may we have it indicated that that is the fourth item from the end of that list, Stakset Exhibit 1.” [172]

Mr. Stafford: Now, of course, in this case it is Plaintiff’s Exhibit No. 2.

“——fourth from the end on the last page, the one that has ‘new’ marked after it?

“Mr. Whelan: Yes, that’s right.

“Q. There is also listed on these two sheets which have been identified and marked as Stakset Exhibit No. 1 manila rope; isn’t it correct that this

(Deposition of Henry Stakset.)

manila rope was brand new and only had been in the water a few times?

“Mr. Mackey: Just a minute. What item are you referring to?

“Mr. Whelan: I am referring to a great deal of rope on these sheets, there are quite a few.

“Mr. Mackey: All of it?

“Mr. Whelan: Yes.

“Mr. Mackey: All of the manila rope?

“The Witness: Well, most of it was new, yes, but not all of it.

“Mr. Whelan: Not all of it?

“A. No.

“Q. Manila rope was very hard to obtain in 1941, wasn’t it?

“A. Yes, it was hard to get.

“Q. There is also listed here one large purse drum and one small purse drum. When were these bought?

“A. When I bought them new.

“Q. When you bought them new. Were they replaced at any time? A. No.

“Q. Were they kept in first-class condition?

[173]

“A. Yes. They are wire, they last for years.

“Q. Did you paint them?

“A. Yes, paint them every year.

“Q. Every year. There is also listed on this list anchor shackles. These were bought at the same time the vessel was built?

“A. I can’t say that, I don’t remember that.

(Deposition of Henry Stakset.)

“Q. Do you know when they were bought?

“A. No, I don’t remember that.

“Q. Do you know when they were bought?

“A. No, I don’t remember that.

“Q. At the head of this list is mentioned some 6500 6-inch Sel. Corks. Where were these bought?

“A. Bought most of them the first year from Lindgren.

“Q. Did you replace them? A. Yes.

“Q. How many were replaced?

“A. That I can’t tell. When they broke we replaced them.

“Q. You kept these corks in first class condition?

“A. Yes; we dried them every year.

“Mr. Mackey: Q. Dried them every year?

“A. Yes.

“Mr. Whelan: Q. Cork was obtainable in 1941, wasn’t it?”

Mr. Maloy: That question wasn’t answered.

Mr. Stafford: That was withdrawn.

“Q. In 1937, when you purchased these corks, did you have any trouble buying them? [174]

“A. 1937?

“Q. 1937 A. They were hard to get.

“Q. It was hard to get in 1937? A. Yes.

“Q. The same condition existed in 1938 and 1939? A. Yes.

“Q. The same condition in 1940 and 1941?

“A. Yes.

(Deposition of Henry Stakset.)

“Q. These corks were in first-class condition, though, at the time of the sale to Mikelsen in August, 1941?

“A. Yes, they were as good as you could get them. They had been used.

“Q. There is mention on this list, Mr. Stakset, of wood blocks. Were they part of the original equipment of the vessel?

“A. Most of them; broke probably a couple of them.

“Q. And replaced them from time to time, is that correct? A. Yes.

“Q. Do you know the last time you replaced them?

“A. No. One broke down there, I can’t remember the year.

“Q. Do you know if it was 1939 or 1940?

“A. It was 1938.

“Q. When you sold the fishing gear and equipment to Mikelsen and his partner, you and your partners received \$4,000? A. Yes. [175]

“Q. That is correct, isn’t it?

“A. That is correct.

“Q. You are still familiar with the value of fishing equipment, aren’t you? A. Yes.

“Q. Where are you working now, Mr. Stakset?

“A. My own boat, the North Sea.

“Q. You are the master of that vessel?

“A. Yes.

“Q. How large a vessel is that?

“A. 63½ feet.

(Deposition of Henry Stakset.)

“Q. Since August, 1941, have you been working on fishing vessels? A. Yes.

“Q. You have handled the fishing gear and other equipment on these various fishing boats?

“A. Yes.

“Q. Have you done any repairs on these fishing gear and equipment on these other vessels?

“A. Yes.

“Q. Have you replaced any equipment and fishing gear on these vessels?

“A. On my own boat I replaced the gear.

“Q. Do you know in October, 1944, the value of fishing gear and equipment? A. Yes.

“Q. You knew in August, 1941, the value of your fishing gear, didn’t you? A. Yes.

“Q. What was the value of your fishing gear in [176] February, 1942, if you know?”

Mr. Stafford: Well, just a minute. I object to the admission of the answer to that question, your Honor, for a number of reasons. The first is that this man has testified that he sold this equipment for \$4,000 in August or September, 1941. There is not one word of evidence even suggested that he saw the equipment after August or September of 1941. How can he be permitted to testify as to its value in February 1942?

In other words, there has been no proper foundation laid for any testimony that would permit him to express an opinion as to its value in February 1942.

(Deposition of Henry Stakset.)

For those reasons we object to the admission of the answer to that question.

The Court: Will you read beginning with line 19 on page 25, both of you. It seems to be postponed. There is nothing done until you get down to that point.

Mr. Maloy: Do you want me to read that on page 25, all of it?

The Court: No. I would suggest that you read it, line 21.

Mr. Stafford: I still reassert my objection. There is not a bit of evidence here that——

Mr. Maloy (Interrupting): "You knew the value of your fishing gear in February, 1942, isn't that correct?" He says, "Yes."

Mr. Stafford: Well, of course, we can all stop if you are going to read questions and answers while the objection is being considered.

The Court: There is nothing answered. He doesn't [177] state the value yet.

Mr. Stafford: I know that, your Honor, but I am objecting to him testifying as to the value, when there is no proper foundation laid here.

Mr. Maloy: He said he knew the value.

The Court: I asked that you both read that line 21, and now I assume that both of you have read it, and the Court has read it and has considered it, and the objection to the inquiry is overruled in view of the witness' last answer on line 22, page 25.

Mr. Stafford: Which is merely his own statement that he knew the value in February?

(Deposition of Henry Stakset.)

The Court: Yes. I have in mind, Mr. Stafford, the witness's previous testimony about his connection with fishing and with the conditions and supply of fishing netting at about this time.

Mr. Stafford: I do not think I make myself clear to the Court. Here is a man—suppose I sold my automobile in September of 1941, and I knew all about that automobile, and I didn't see it until February of 1942. How can I testify as to what it is worth in February 1942?

The Court: I think from what appears in this deposition that this witness has shown familiarity with the conditions of this particular property and its surroundings.

Mr. Stafford: Your Honor, up to this point there is not a bit of evidence that he saw that property between September 1941 and February 1942.

The Court: The objection is overruled. [178]

Mr. Stafford: Exception.

The Court: Allowed.

“Q. What was the value of your fishing gear in February, 1942?

“A. About nine or ten thousand dollars.

“Q. Mr. Stakset, you testified that you used your boat from 1937 to 1940, inclusive.

“A. Correct.

“Q. During the years 1938 and 1939 you made large purchases of webbing; isn't that correct?

“A. Yes, that is correct.

“Q. Did you make large purchases of webbing in the years 1938 and 1939?

(Deposition of Henry Stakset.)

“A. Yes, quite a bit in 1938 and 1939.

“Q. 1940 was the last replacement that you made; is that correct? A. That is correct.

“Q. You have also testified that your original outfit cost about \$8000; is that correct?

“Mr. Mackey: He said seven to eight thousand.

“Mr. Whelan: Q. Seven to eight thousand dollars? A. The fishing gear, yes.

“Q. Had the price of fishing gear gone up from the time you first made your purchase of this gear in 1937 to 1941?”

Mr. Stafford: We will object to that, your Honor. There is no proper foundation.

The Court: Well, he doesn't answer it, does he?

Mr. Maloy: I don't believe he does. The objection [179] is made and he doesn't answer it. The next question is:

“Q. What is the life of this netting or webbing?

“A. Well, that all depends on how it is taken care of.

“Q. If it is taken very good care of?

“A. It will last four or five years.

“Q. You tarred this webbing several times during the last—

“Mr. Mackey: Just a moment. Not several times. I object to your putting words into the testimony. He said he tarred it once when he first started, and dipped it once more.

“A. That's right.

“Q. You salted the webbing down, is that correct? A. Correct.

“Q. What year was that done?

(Deposition of Henry Stakset.)

“A. We salted every year. The last time I came in we salted it again.

“Q. Where was that, in Tacoma?

“A. In Seattle.

“Q. That was in the spring, February of 1941; is that correct? A. That is correct.

“Q. Did I understand you to say, Mr. Stakset, that you chartered your boat out during the summer? A. In the summer time.

“Q. How long did that charter generally run?

“A. Oh, from four to five months.

“Q. Did you go over and repair your equipment after the vessel had been chartered out? [180]

“A. I repaired the vessel, yes.

“Q. What replacements did you buy from Cincotta Brothers here in San Francisco?

“A. I bought webbing and rope.

“Q. You bought webbing and rope?

“A. Yes.

“Q. Anything else?

“A. I can't remember exactly.

“Q. Did you buy your wood blocks from him?

“A. One or two.

“Q. Did you buy any of the rubber buoys?

“A. Might have bought big round ones, I think we got them from Cincotta.

“Q. Do you know when these were bought?

“A. No, I don't remember; 1938, I think.

“Q. You have testified as to bags of rubber, I believe it is these Montara bags, 175, which were bought sometime in 1938 or 1939.

(Deposition of Henry Stakset.)

“Mr. Mackey: No; part in 1937 and the rest in 1938, he said.

“Mr. Whelan: 1938.

“Q. Did you ever replace any of these bags?

“A. A few of them got busted.

“Q. Do you know what it cost you to replace them?

“A. No; \$5 apiece, I think. I believe so, I am not sure.

“Mr. Whelan: I have no more questions.

Redirect Examination

“Mr. Mackey: Q. Mr. Stakset, I have here a list of [181] materials on the letterhead of Cincotta Brothers, dated October 13, 1944, and identified at the top as ‘Purchases made by the M/S Midnight Sun during the year 1940.’ Will you look at that list?

“Mr. Whelan: I am going to object to that on the ground it is too remote.

“Mr. Mackey: Q. Will you look at that list and see if that will refresh your recollection as to the purchase that you made from Cincotta Brothers in 1940?

“A. That is pretty hard to remember.

“Q. Do you know Mr. Ernst down there at Cincotta Brothers? A. The timekeeper?

“Q. Yes. A. Yes.

“Q. You saw that list down there yesterday when we were talking it over with—you and I with Mr. Ernst? A. Yes.

(Deposition of Henry Stakset.)

“Q. Will that refresh your recollection as to the purchases that you made down at that place in 1940? A. I cannot remember that.

“Q. Would you look over that list and see if you remember any purchases that you made at Cincotta’s that is not on that list; I mean purchases made in 1940.

“A. I can’t remember all those small things.

“Q. Your purchases from Cincotta Brothers were only things that you happened to find that you would need during the fishing season after you got down here, weren’t they? [182] A. Yes.

“Q. Will you look at that list and see if that fairly represents about the type of thing and the amount of purchases you would make from Cincotta Brothers in a season?

“Mr. Whelan: Objection. The witness has testified he can’t remember.

“The Witness: I can’t tell exactly.

“Mr. Mackey: Q. I am trying to get you to tell me whether that fairly represents about the type of thing that you would purchase from Cincotta Brothers during the season down here.

“A. Well——

“Q. I don’t mean to say that you have to purchase each one of those items, but does that fairly represent what you purchased?

“A. Some years may buy more than others; if you happen to tear a seine or anything you buy more than in other years. There are lots of small things there.

(Deposition of Henry Stakset.)

“Q. Well, you bought lots of small things of that sort, didn’t you, from Cincotta Brothers from time to time?

“A. When we need them we buy them, yes.

“Q. Doesn’t that represent about the type of thing you would buy from them?

“A. Well, it must be. I can’t remember all those things, there.

“Q. Tell me whether that is about the type of thing that you would go in there and buy.

“A. Well, that is the type of thing, but some years [183] you buy quite a bit.

“Q. I appreciate that. I wouldn’t try to get you to say that exactly represents what you bought, but is that about the kind of thing, the kind of purchase that you would normally make down there?

“A. Well, some of it, yes.

“Q. Well, is there anything on there that you would not normally buy?

“A. Well, when you need it you buy it. I can’t tell what is—

“Q. Well, can you refresh yourself on these items of September 25, 1940, under that group, totaling \$3.46?

“A. Yes.

“Q. You would sometimes buy that kind of thing at Cincotta Brothers during the season?

“A. Yes.

“Q. Then for September 29, 1940, I see items of marine glue, patches, tape, a 6-inch purse block, and some galvanized screws and boat nails, totaling \$9.01; you would normally buy that kind of thing?

(Deposition of Henry Stakset.)

“A. Yes.

“Q. Wouldn’t you, when you came down here?

“A. Yes.

“Q. The same type of thing occurred on September 1st, October 1st, rather, totaling \$6.32; that is about the type of thing? A. Yes.

“Q. Some flashlight batteries and manila rope on October 21st, totaling \$7.25. October 24th I see 16 pounds of 3½-inch 3-strand bolt rope, 69 pounds of [184] 54 by 1½ by 200 netting, 58 cents a pound, total for that day being \$47.38. That is a fairly large purchase for that day.

“A. Yes. That is a brailer.

“Q. Yes, that is a brailer. On October 28th, diaphragm pump washer, \$2.22. This, generally, represents the kind of thing you would be buying there? A. Yes, small things.

“Q. And I see here on November 11 you purchased 149 pounds of 16-fathoms 15-thread 1¾ by 400 netting 6400 mesh. A. Yes.

“Q. 74 cents a pound; \$136.15 being the purchase on that day. Does that fairly represent about the kind of things you would be buying?

“A. Yes, sir.

“Q. I call your attention to the fact that the total for the 1940 purchases, including January of that year, was \$440. Is that about what it would run? A. I can’t remember.”

The Court: Go down to the recross examination, line 16.

(Deposition of Henry Stakset.)

“Recross Examination

“Mr. Whelan: Q. Mr. Stakset, when you start out on a fishing trip you usually start from Tacoma?

“A. Seattle.

“Q. At that time you usually make all the purchases and replacements of equipment before you start out? [185] A. Yes.

“Q. Whom do you usually buy your equipment from at that time?

“A. Oh, the stores up in Seattle, there.

“Q. Would that be the Pacific Marine Supply Company? A. Yes.

“Q. Nordby Supply Company?

“A. Yes, and Seattle Ship Supply.

“Q. When you go into Cincotta Brothers that is just for small things; isn’t that right?

“A. That is when you are fishing.

“Q. You are just going in and making purchases of what you actually need; isn’t that correct?

“A. That is correct.

“Q. And all the equipment that you need, including netting, has already been purchased before you start out on your fishing trip? A. Yes.

“Q. So if you make any purchases of netting from Cincotta Brothers it is either for the purpose of repairs or for replacement at that time between fishing trips into San Francisco and then out again?

“A. That is correct.

“Mr. Whelan: That is all.

(Deposition of Henry Stakset.)

“Further Redirect Examination

“Mr. Mackey: Q. The price that you paid for netting varied according to the number of threads in the netting, and the mesh, didn’t it?

“A. Yes. [186]

“Q. So you cannot say that all netting is so much a pound? A. No.

“Q. I believe you testified a little while ago this netting was so much a pound, but I don’t know what netting you had in mind; I don’t know how much you said—

“A. It all depends what year it was.

“Q. And also on the netting?

“A. The netting, yes.

“Mr. Whelan: I think he testified that in 1938, at the time he was making his purchase of netting for replacement, that he paid 80 cents per pound.

“Q. What netting did you have in mind?

“A. That was the netting for the seine, 1 $\frac{3}{8}$ inches.

“Q. How many pounds?

“A. Just a few cents difference, I think.

“Q. What thread netting did you have in mind at 80 cents? A. 9-thread.

“Q. 1 $\frac{3}{8}$ inches? A. Yes.

“Q. Is that the 400 mesh? A. Yes.

“Q. Now, there is one item that I overlooked asking you about, and I don’t understand it. I see on this list, Stakset Exhibit No. 1, some pen boards. It is the seventh item from the bottom on the first page on this Stakset Exhibit No. 1. What are your pen boards?

(Deposition of Henry Stakset.)

“A. We use pen boards in the hold to keep the fish [187] from sliding, and sometimes I guess you would call it drain boards; that is to keep the fish from not going over the side.

“Q. What are they, just planks?

“A. Yes, planks.

“Q. What are the sizes of the planks?

“A. Well, about $2\frac{1}{4}$ by 12.

“Q. $2\frac{1}{4}$ by 12 inches; how long?

“A. Well, that is according to the length of the hold in the boat.

“Q. Those pen boards used in the hold run fore-and-aft on your boat? A. Yes.

“Q. They divide the hold in half?

“A. Yes.

“Q. How long was your hold?

“A. About 38 feet.

“Q. 38 feet? A. Yes.

“Q. Would your pen boards be that long, or would you have to use two or three boards?

“A. Have to use two or three.

“Q. Two or three lengths.

“A. And extensions between.

“Q. Do you think these pen boards would be 12 feet long? A. Some of them, yes.

“Q. Some are purchased like that?

“A. Yes.

“Q. Are any of them longer than that? [188]

“A. No, not longer.

“Q. How high were the pen boards in the middle of the ship?

(Deposition of Henry Stakset.)

“A. About seven or eight feet.

“Q. So what that was was 2 by 12 planks?

“A. Yes.

“Q. Is that rough surface?

“A. No, that is planed and painted.

“Q. Planed and painted. A. Yes.

“Q. And 2 by 12 planks laid on edge so as to go up seven or eight feet, and so as to go the length of a hold, about 38 feet? A. Yes.

“Q. Now, would you call those pen boards or—

“A. Well, we call them deck planks, too; sometimes call them pen boards, and sometimes call them deck planks.

“Q. The same kind of boards.

“A. We had 2 $\frac{3}{4}$ inches thick by 12.

“Q. 2 $\frac{3}{4}$ by 12? A. Yes.

“Q. You use those along the railing on a ship?

“A. Yes.

“Q. About how many of those would you have on deck?

“A. We had four lengthwise and about six crosswise.

“Q. Those would be 2 $\frac{1}{4}$ inches thick, 12 inches wide, and about 12 feet long?

“A. Well, the boat was 20 feet across; say 16 feet lengthways.

“Q. I am trying to get about how many boards there [189] would be 12 feet long; about how many boards would there be if they are on the boat 12 feet long?

(Deposition of Henry Stakset.)

“A. I would have to figure that out. About eight or ten boards, I guess, on the deck.

“Q. What were these, fir boards? A. Yes.

“Q. Where is Mr. Hanney now, do you know?

“A. He is in Monterey.

“Q. Have you seen him since you have been down here? A. Yes.

“Q. Where is Mr. Mikelsen?

“A. He is in San Francisco, here.

“Q. Is he with you now on the same boat?

“A. No, he is fishing on his own boat.

“Q. Have you seen him?

“A. Yes, I saw him once.

“Q. Was that Mr. Mikelsen down there at Cincotta's the other day when I was down there?

“A. I saw him the same day, but I don't know if he was there.

“Q. How long have you known him?

“A. Oh, I know him since 1937, I think.

“Q. I called with you about a month ago, didn't I? A. Yes.

“Q. Then I talked with you again yesterday?

“A. Yes.

“Q. You have talked with Mr. Whelan here about this case, haven't you? A. Yes.

“Q. That was yesterday? [190] A. Yes.

“Q. When did you come in to San Francisco this last trip?

“A. It was Friday we came here.

“Q. When did you talk to Mr. Whelan?

“A. That was yesterday morning.

(Deposition of Henry Stakset.)

“Q. You did not call me, though, did you?

“A. No; I was so busy I don’t know who to call first.

“Mr. Mackey: That’s all.”

The Court: This deposition is received as part of the case in chief of the Plaintiffs.

Further proceedings in the case are continued until two o’clock this afternoon. The jury may now retire until that time.

(Whereupon, at 12:20 p.m., a recess was taken herein until 2:00 p.m., November 1, 1944.) [191]

Mr. Maloy: Mr. Duren, will you again take the stand?

H. T. DUREN,

recalled as a witness in behalf of the Plaintiffs, being previously duly sworn, testified further as follows:

Direct Examination (Continued)

By Mr. Maloy:

Q. Mr. Duren, you have stated that Mr. Cochran suggested that you write him in presenting a claim on behalf of the Plaintiffs, is that correct?

A. Yes.

Q. And did you thereafter write him a letter?

A. I did.

Q. You are handed Plaintiffs’ Exhibit 4 for identification, Mr. Duren. Will you state what that is?

(Testimony of H. T. Duren.)

A. That is a letter dated June 8 to the Franklin Fire Insurance Company of Philadelphia, Dexter Horton Building, Seattle, attention of Mr. Ed Cochran, Marine Manager.

The Court: Not quite so much detail.

Mr. Maloy: Don't read it.

The Court: Just answer the question.

A. Well, the letter is signed by the firm.

Q. By whom? [211] A. By myself.

Mr. Maloy: I will offer the letter in evidence with the two portions deleted.

The Court: I would like to know if it is the letter he mentioned when he was on the stand before.

Q. (By Mr. Maloy): Signed by yourself, or by the firm?

Q. (By Mr. Maloy): Is that the letter you mentioned before that you wrote to the Franklin Fire Insurance Company on June 8?

A. Yes, it is.

Q. And you wrote that on behalf of the Plaintiffs? A. I did.

Q. At their request? A. I did.

Mr. Maloy: I will offer the letter with the excluded portions eliminated, your Honor.

Mr. Stafford: My objection is already stated.

The Court: Yes, and subject to what the Court already said, this Plaintiff's Exhibit 4 is admitted in evidence.

(Whereupon, Plaintiff's Exhibit 4 for identification was admitted in evidence.)

(Testimony of H. T. Duren.)

PLAINTIFFS' EXHIBIT No. 4

(Letterhead)

Hansen & Rowland Inc.
Tacoma, Washington
June 8, 1942

The Franklin Fire Insurance Co. of
Philadelphia, Pa.
Dexter-Horton Building
Seattle, Washington

Attention: Ed Cochrane, Marine Manager

Re: Your Policy No. 44298—Peter Petersen dba Marine View Boat Building Company, Builder and Oluf B. Hanney, Owner—Builders' Risks Insurance on Hull No. 20

Gentlemen:

You will recall the writer was in your office a few days ago, and informed you certain equipment and property purchased by Mr. Hanney for Hull #20 was destroyed by fire during the currency of Policy #44298, and while Hull #20 was under construction.

You no doubt are aware a large fishermens storage warehouse of the Port of Seattle, located at Fishermens Dock in Ballard, suffered a disastrous fire some time ago. At the time of this fire, Mr. Hanney had under rental to him a storage locker in this warehouse. During the course of construction of Hull #20 Mr. Hanney purchased different ma-

(Testimony of H. T. Duren.)

terial and equipment for the vessel and stored it in the locker referred to. The fire in the warehouse consumed this material and equipment, and it is the contention of Mr. Hanney, he is entitled to recover the resulting loss under your policy #44298.

The policy recites under Clauses for Builders' Risks, "including materials In Buildings, Workshops, yards and docks of the assured, or on quays, pontoons, craft, etc." It is the assured's contention the material was located in building under rental to him, and the property lost was intended for the vessel under construction and covered by the policy.

Attached hereto you will find a schedule of substantially all of the equipment involved, however the value thereof is yet to be determined.

We are presenting this case to you on behalf of Mr. Hanney, who is a client of our office, and we would like you to advise us if you are prepared to accept and acknowledge liability under your policy after which the details and the amount of the loss can be worked out and established.

We have advised Mr. Haney we felt it would be best to take up with you the particulars, and ascertain if you recognize his loss of equipment as an admissible claim under your policy, and if so, we could then work out an equitable adjustment with you, but before going any further we would like from you an expression of your ideas.

(Testimony of H. T. Duren.)

Thanking you for an early acknowledgment, we are

Very truly yours,

HANSEN & ROWLAND, INC.

General Agents

(Signed) H. T. DUREN

H. T. Duren

Manager Marine Department

HTD #3 Encl.

Stamp endorsement: Received Jun 10, 1942, Seattle Office.

1 Life-Boat, 5 oars, 4 oar locks

1 Seine Canvas—20x20 ft.

200 Fathom 4½ inch rope

4 Turn Buckle Clamps

1 Norwegian Cable—350 fathoms, 5/8"

4 tying up lines, 5 inch

Pan boards—\$250.00

1 Double Block, 12 inch

2 Single Blocks, 12 inch

2 Double Blocks, 10 inch

1½ Blocks—10 inch

2 Single Blocks, 10 inch

1 iron block

50 Fathom cable, 5/8"

1 Deck hose and nozzle

4 Deck Brooms

2 Buckets

11 Mattresses

11 Life Preservers

(Testimony of H. T. Duren.)

50 Fathoms—3 $\frac{3}{4}$ rope
50 Fathoms—3 $\frac{1}{2}$ rope
20 Fathoms—3 rope
2 purse drums
2 1-inch Shackles
2 $\frac{7}{8}$ " Shackles
2 Double Blocks—7 inch
2 Single Blocks—7 inch
50 Fathoms—2 $\frac{1}{2}$ rope
40 lbs. Lead
1 Garbage Can
80 lbs. Rings, Shackle, Hooks
1 8" cleat
2 Hoops

Mr. Maloy: I would like to read the letter to the jury. Of course, I will not read the two portions that we have talked about.

The Court: You may now read it to the jury.

(Whereupon, Mr. Maloy read Plain- [212] tiffs' Exhibit 4 to the jury.)

Mr. Maloy: Attached to that is a list of the equipment which is described in the inventory, which is Plaintiffs' Exhibit No. 2. I shall not read that again.

(Testimony of H. T. Duren.)

Q. (By Mr. Maloy): Now, Mr. Duren, did you receive an answer to the letter which has been identified here as Plaintiffs' Exhibit 4 and which I have just read to the jury? A. I did.

Q. What is Plaintiffs' Exhibit 5?

A. It is a letter dated June 18 to Hansen & Rowland.

The Court: Try to avail reading from it. Just answer the question.

Q. (By Mr. Maloy): Who is it addressed to and who signed it?

A. It is addressed to Hansen & Rowland, Inc., attention of myself, and signed by E. E. Cochran, Marine Manager.

Mr. Maloy: I would like to offer that in evidence, please.

The Court: The Court would like to know from the witness if that is the letter which he had just previously mentioned as being the reply to his letter?

Mr. Maloy: I asked him that question. I will ask it again.

Q. (By Mr. Maloy): Is that the answer to your letter of June 8? [213] A. It is.

Mr. Stafford: My objection is already a matter of record.

The Court: And are you familiar sufficiently with the document—

Mr. Stafford: (Interrupting) I have never seen the original.

(Testimony of H. T. Duren.)

The Court: Will you let opposing Counsel see that?

Mr. Maloy: You have a carbon copy of it, haven't you?

Mr. Stafford: I said I had never seen the original.

The Court: The objections have already been noted, and the Court's ruling theron made. Plaintiffs' Exhibit 5 is now admitted in evidence.

(Whereupon, Plaintiffs' Exhibit No. 5 for identification was admitted in evidence.)

PLAINTIFFS' EXHIBIT No. 5

(Letterhead)

The Franklin Fire Insurance Company
of Philadelphia
Pennsylvania
Seattle, Washington

June 18th, 1942

Hansen and Rowland, Inc.

Washington Building

Tacoma, Washington

Attention: Mr. H. T. Duren, Manager, Marine
Dept.

Re: Peter Petersen d/b/a Marine View
Boat Building Co., Builder & Oluf F.
Hanney, Owner Pol. #44298
Loss—Feb. 1942.

Gentlemen:

Receipt is acknowledged of your letter of June 8th, in which you advise that it is the contention

(Testimony of H. T. Duren.)

of Mr. Hanney that he is entitled to recover, under the above-numbered policy, for the loss of material and equipment in a fire which destroyed large fishermen's storage warehouse of the Port of Seattle, where Mr. Hanney had a storage locker.

We are of the opinion that the assured does not have a claim under this policy on account of the loss described in your letter of June 8th and we expressly reserve all rights and defenses under the policy.

With that reservation in mind and without intending any qualification of that reservation, we make the following additional comment on the contents of your letter of June 8th:

The loss described in your letter occurred as a result of the destruction by fire of a dock owned by the Port of Seattle and in which the assured was the tenant of a storage locker. In this locker the assured states that he had stored material and equipment intended for use in the construction of Hull #20 and it was this material and equipment which was destroyed in the fire.

You quote a clause under "Clauses for Builders' Risks" of the policy, particularly the words "including materials in buildings, workshops, yards and docks of the assured. . . .". You then state that this language covers material in a building of which a portion is rented to the assured.

It is our position that your interpretation of this policy in effect deletes from the clause the words "of the assured". If these words mean any-

(Testimony of H. T. Duren.)

thing they mean what they say; namely, the buildings, workshops and yards over which the assured has complete domination. The policy was clearly never intended to cover material placed in lockers in any building, regardless of type of hazard.

We trust that Mr. Hanney will understand why his loss does not constitute a proper claim under our policy, as the materials which he lost were not in buildings, workshops, yards or docks, or on quays, pontoons, craft or similar property, owned by him.

Yours very truly,
C. E. COCHRANE
Marine Manager

CEC-HAR

Mr. Maloy: I should like to read it to the jury, if it please your Honor.

The Court: You may now read it to the jury.
(Whereupon, Mr. Maloy read Plaintiffs' Exhibit 5 to the jury.)

Mr. Maloy: You may cross-examine.

Mr. Stafford: No questions.

Mr. Maloy: That is all, Mr. Duren. [214]

The Court: You may be excused, and there is no objection to the Court excusing this witness permanently?

Mr. Stafford: None on the part of the Defendant.

(Testimony of H. T. Duren.)

The Court: You may be excused from further appearing as a witness at this time.

(Witness excused.)

[215]

The Court: Call your next witness.

Mr. Maloy: I will call Mr. Paul Vohl.

PAUL VOHL

one of the Plaintiffs, called as a witness, being first duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Will you please state your name?

A. Paul Vohl.

Q. Where do you live?

A. In Seattle, Washington.

Q. How long have you lived here?

A. I lived here 20 years.

Q. 10 years? A. 20 years.

Q. 20 years? Speak up distinctly so that the jury can all hear you, Mr. Vohl. What has been your business during such period of time?

A. Fishing.

Q. What kind of fishing have you been engaged in?

A. Well, at first it was halibut fishing, and now I am sardine fishing.

Q. Have you been engaged in any other kind of fishing? A. No.

(Testimony of Paul Vohl.)

Q. Just sardine and halibut? Are you acquainted with Hans Mikelsen, one of the Plaintiffs in this case? A. Yes.

Q. And with Oluf B. Hanney? [216]

A. Yes.

Q. Did you, during the summer of 1941, become interested with them in any venture or business?

A. Yes.

Q. What was it? A. Building a boat.

Q. What boat was that, Mr. Vohl?

A. It was the boat Trade Wind.

Q. The Trade Wind? A. Yes.

Q. That is what you call it now, isn't it?

A. Yes.

Q. When it was being built, how was it described? A. It was Hull No. 20

Q. That fishing boat was being built over at Brown's Point, Tacoma? A. Yes.

Q. Now, during the summer of 1941, did you and your partner acquire any fishing gear and equipment from anyone? A. Yes.

Q. From whom? A. Mr. Stakset.

Q. Is that Mr. Henry Stakset?

A. Yes, sir.

Q. Of Tacoma? A. Yes.

Q. What did you buy from him, if anything?

A. We bought fishing gear, netting and purse lines and cork.

Q. About when did you purchase this personal property from him? [217] A. In August.

Q. Of what year? A. '41.

(Testimony of Paul Vohl.)

Q. Before you purchased it from Mr. Stakset, did you examine or inspect it? A. Yes.

Q. Where was it then located?

A. It was at Salmon Bay Terminal, Locker 325.

Q. Is that a place where Mr. Stakset had previously stored it? A. Yes.

Q. Did you examine or inspect the material and equipment before you purchased it, alone or with somebody else?

A. With Mr. Mikelsen.

Q. Mr. Hans Mikelsen? About when did you inspect it?

A. Well, I would say it was in July, before we bought it. I wouldn't know the exact date.

Q. What did you and Mr. Mikelsen do in order to inspect it?

A. Well, we took it out of the salt, especially the netting that was in the salt. That was the main thing.

Q. You speak of the salt. What had the salt to do with it?

A. Well, the netting was salted down, covered with salt.

The Court: May I ask you, Mr. Vohl, every time you speak, speak as distinctly as you can, and keep your voice raised, because sometimes it is difficult for us to hear distinctly your words. So have in mind to pronounce your words as distinctly as you can.

Q. (Mr. Maloy) What is the purpose of salting the webbing down?

(Testimony of Paul Vohl.)

A. For keeping the webbing. [218]

Q. Was this webbing salted down when you inspected it? A. Yes.

Q. And after you had inspected it, what did you do with the webbing?

A. We put it back again, covered it with salt.

Q. Did you salt it down after you put it back?

A. Yes.

Q. What was the condition of the webbing when you and Mr. Mikelsen inspected it?

A. It was in first-class condition.

Q. Did you test it in anywise during your inspection and examination of it? A. Yes.

Q. Tell the jury what you did to test it.

A. Well, testing netting, you take the netting between your hands. If you can't tear it, it is in good condition, first-class condition. You use your strength of tearing it.

Q. You use your strength and try to tear it, is that it? A. Yes.

Q. Did you examine the other equipment which was in the locker? A. Yes.

Q. Did you take part in the making up of an inventory of the fishing gear and equipment which was in Locker 325? A. Yes.

Q. Was such an inventory prepared?

A. Yes.

Q. Who prepared it? Who prepared the inventory? Who made up the list? [219]

A. Well, I don't know who made the list, but we were there.

(Testimony of Paul Vohl.)

Q. You checked over this list?

A. Checked over it.

Q. I will hand you Plaintiffs' Exhibit 2 and ask you if that is the inventory which was made up?

A. Yes, that is it.

Q. And that is a list of the property that you and Mr. Mikelsen examined in Locker 325?

A. Yes.

Q. Now, in that list are described other pieces of equipment, such as purse wire and webbing. Was any of the webbing new?

A. Yes, there was what you call one bale of webbing new. That is around 160 fathoms, I would say.

Q. Was any other of that property new?

A. Yes, the purse cable.

Q. The purse cable? Is that what is referred to as purse wire? A. That is right.

Q. What kind of purse wire was that? Do you know of what manufacture? Was it made in this country or somewhere else?

A. No, it was Norwegian cable.

Q. Is that good purse wire? A. Yes.

Q. And was that new?

A. Brand new. It hadn't been used.

Q. Were there any other items of property included in that list comprising Plaintiffs' Exhibit 2 which was new?

A. There was some new ropes, manila ropes.

[220]

Q. New manila ropes? A. Yes.

(Testimony of Paul Vohl.)

Q. What was the condition of the manila rope? What was its condition?

A. They were in good condition.

Q. There were some purse drums in that list. What was the condition of those?

A. They were in good condition.

Q. The shackle bolts and the various other items there, what was the condition of all of it?

A. They were all in good condition.

Q. What was the condition of the cork?

A. Good corks.

Q. What was the condition of the Montara bags?

A. They were also in good condition.

Q. Was that personal property, then, after you had examined it, put back in the locker?

A. Yes.

Q. Did it stay there until the fire which burned it up? A. Yes.

Q. Did you have occasion at any time to see it between the time that you inspected it prior to your purchase of it and the time of the fire?

A. Yes, we were in a few times looking at it, but that is all.

Q. Was there any change in the condition of it between the time you first inspected it in 1941 and the last time you saw it? A. No.

Q. When was the last time you saw it, do you think? [221]

A. That I couldn't say offhand. We went in once in a while.

(Testimony of Paul Vohl.)

Q. You aren't able to state the last time, approximately? What month? Could you state that?

A. Well, I would say in January.

Q. You would say in January of what year?

A. '42.

Q. Mr. Vohl, did you have anything to do with securing the issuance of this Builders Risk Policy which you are suing on in this case? A. Yes.

Q. Did you have anything to do with the renewals of that policy from time to time?

A. Yes.

Q. When did you have any advice with the insurance company concerning its renewal?

A. In November, '41.

Q. Tell us what you did and who you saw about renewing it.

Mr. Stafford: Now, if your Honor, please, I object on the ground that there is no issue as to which parol evidence should be admitted here; on the ground that we have admitted that the policy was renewed from time to time and was in force at the time of this fire, there being no issue to which this testimony can go at all.

The Court: What is the purpose, if you will state it briefly?

Mr. Maloy: Well, my information is that Mr. Vohl went up there—you see, the policy was for three months—

Mr. Stafford (Interrupting) If this is going to be an offer of proof—

Mr. Maloy (Interrupting) No, it isn't going to be [222] an offer of proof. Don't be so touchy, Mr. Stafford. I am simply going to state that he went

(Testimony of Paul Vohl.)

up there and had a talk with Mr. Wheelock about renewing the policy. In that conversation some remarks were made which I think bear upon the interpretation of this policy.

The Court: So it is upon that question of interpretation that you make the offer?

Mr. Maloy: Yes, your Honor.

The Court: That you seek to inquire?

Mr. Maloy: Yes, the surrounding circumstances.

The Court: Do you wish, then, to register your objection?

Mr. Stafford: Oh, yes; by all means, your Honor. I want the record to show that the defendant objects to the admission of any such testimony on the ground that, as I have so frequently stated in this trial, there is no issue here requiring the admission of parol evidence, and—oh, I think I have elaborated on that objection so long that the record must be rather clear on it.

The Court: The objection is noted and overruled. I would make this suggestion, if you find that there is more than one way of getting at the matter, the shortest way would be the best.

Q. (Mr. Maloy) I shall ask Mr. Vohl to state what took place when he went up there in connection with the renewal of the policy, and what conversation took place, if any.

Mr. Stafford: The same objection, if your Honor please.

The Court: Overruled.

(Testimony of Paul Vohl.)

Mr. Stafford: A violation of the parol evidence [223] rule.

Q. (Mr. Maloy) Have you the question in mind, Mr. Vohl?

A. Yes, I went up to Mr. Wheelock's office in November, 1941 and asked him about this policy. It was just those three months was just overdue, you know, it was just ready for renewal, rather, and I went up and talked to him to renew the policy; and he says, "All right", and I also asked him about the stuff we had stored at the Fishermen's Dock in Ballard, if that was also covered, and he says, "Yes".

Q. Did you have any further talks with him after the conversation you have detailed in November respecting renewal of the policy?

A. No.

Q. Or regarding the property at Locker 325 or elsewhere? A. No.

Q. Now, I want to go back a minute to your examination of this webbing. When you and Mr. Mikelsen examined it, did you observe whether or not it had been tarred, treated with tar?

A. It has been tarred, yes.

Q. It had been? What is the purpose of having the webbing tarred?

A. You always tar the webbing when it is new.

Q. What is the purpose of it?

A. So it keeps.

Q. To preserve it, is that right?

A. That is right.

(Testimony of Paul Vohl.)

Q. This vessel you mentioned as being the Trade Wind—which was the name you gave to Hull No. 20, wasn't it? [224] A. Yes.

Q. What kind of a fishing vessel is that?

A. That is what you call a combination fishing vessel, but mostly for sardines.

Q. Now, in your experience as a fisherman, Mr. Vohl, have you bought and sold webbing and other fish gear and equipment? A. No.

Q. You never have? Have you been present when webbing and other fish gear has been purchased? A. Yes.

Q. Do you know and are you in a position to state the value of this webbing and equipment which is described in Plaintiffs' Exhibit No. 2?

A. Yes.

Q. What was its value on February 24, 1942?

A. That was worth then \$12,000.

Q. Do you know whether or not webbing and fishing gear and equipment such as this was scarce at that time? A. Yes.

Q. Can you state what that was due to, the cause of it? A. Well, the war.

Q. On account of the war? A. Yes.

Mr. Maloy: I don't think of anything else right now, your Honor. There may be a question or two later. I would like to reserve the right to recall him, if necessary.

The Court: You may cross examine. [225]

(Testimony of Paul Vohl.)

Cross Examination

By Mr. Stafford:

Q. You went fishing on this vessel in the year '42, didn't you? A. Yes.

Q. You bought all of this equipment for that vessel, to replace what was burned that year, didn't you? A. We replaced it, yes.

Q. That is right, and what did it cost you brand new at that time? A. \$12,000.

Q. Isn't that the reason why you say this second-hand stuff was worth \$12,000?

A. Because it was new. This fishing gear has to be new.

Q. Do you know how old this fishing gear was that was in the locker? A. Yes.

Q. When was the seine originally bought?

A. In '37.

Q. That was the same seine, except for replacements from time to time, that you bought, wasn't it? A. Yes.

Q. And you bought the whole works for \$4,000, didn't you? A. That is right.

Q. And yet, between September, 1941 and February, 1942, it increased \$8,000 or 200% in value?

A. No.

Q. That is your testimony, isn't it? You say it was worth \$12,000 on February 24?

A. That is right. [226]

Q. And that you paid \$4,000 for it in September? A. That is right.

Q. And it was then four years old?

(Testimony of Paul Vohl.)

A. Yes, but he could have gotten \$8,000 for it.

Mr. Stafford: I have no other questions.

Redirect Examination

By Mr. Maloy:

Q. What was it worth when you bought it, Mr. Vohl? A. It was worth \$8,000.

Mr. Maloy: I think that is all.

Recross Examination

By Mr. Stafford:

Q. It was worth \$8,000, and Mr. Stakset and his nine partners sold it to you as a special concession for \$4,000? A. That is right.

Mr. Stafford: I have no further questions.

Mr. Maloy: That is all, Mr. Vohl.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Maloy: I will call Mr. Mikelsen. I will recall him for a question.

The Court: Mr. Mikesen is recalled to the stand. He has already been sworn. [227]

HANS MIKELSEN

one of the Plaintiffs, recalled as a witness, being previously duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Mr. Mikelsen, I overlooked asking you a question or two. Did I ask you about the web, whether the webbing, when you and Mr. Vohl examined it, had been tarred?

A. No, you didn't.

Q. Well, what is the fact as to whether, when you and Mr. Vohl inspected it before you bought it from Mr. Stakset, as to whether that webbing had been treated with tar?

A. Yes, it has been treated.

Q. What is the purpose of treating it with tar?

A. To preserve it.

Q. Now, do you know whether or not webbing and other fishing gear, such as described in the inventory that was made by Mr. Stakset and yourself, whether there was any scarcity of that during the fall and winter of 1941-42?

A. Yes, very scarce.

Q. Can you state the reason why?

A. On account of the war.

Q. Was it difficult to get new material of that type? A. Yes.

Q. Now, when the various clauses of this insurance policy were read to you by Mr. Wheelock, which you testified to the other day, and he told you that those clauses covered this material, did you believe him?

(Testimony of Hans Mikelsen.)

Mr. Stafford: Now, just a moment, if your Honor [228] please. That is not a proper question. It is leading. Counsel has no—

Mr. Maloy: (Interrupting) The question is whether or not he believed him. I am only directing his attention to some testimony that he gave yesterday.

Mr. Stafford: Counsel has no right to recall the Plaintiff in this case and say, "No, you testified so and so yesterday. Is that true?"

Mr. Maloy: I did not ask him that. Mr. Stafford, I did not ask him that. I asked him whether or not he believed what Mr. Whelock told him.

The Court: Do you understand that the inquiry goes to the witness' reliance or non-reliance upon Mr. Wheelock's statement?

Mr. Maloy: Exactly so.

Mr. Stafford: Now, if your Honor please, I had hoped that we wouldn't run into another one of these, but we are there again.

The Court: Very well, the jury will be asked to retire.

(Whereupon, the jury retired to the jury room, and the following proceedings occurred without their presence and without their hearing:)

Mr. Stafford: Now, if your Honor please, there is absolutely no issue in these pleadings at this time to which the question of the reliance of the Plaintiffs is [229] material or has any part, but

(Testimony of Hans Mikelsen.)

the inquiry is particularly dangerous because of the peculiar situation of the pleadings in this case.

Your Honor will recall that the original complaint in this case contained two causes of action. One was a suit on the policy as written. That was the first cause of action, and that is still right in front of the Court in this case.

The second cause of action was a suit for the reformation of the policy on the ground of misrepresentation by Mr. Wheelock.

Now, of course, I will concede that if the suit for reformation was still before this Court, then the question of reliance, the right to rely and detriment because of reliance on representations, are important matters of inquiry; but since that original complaint was filed, Plaintiffs' Counsel by his own affirmative act, and not from any motion of ours, voluntarily dismissed that second cause of action, so that there is in this case today only one cause of action, and that is the Plaintiffs' suit on the policy as written. He says that this loss is covered under the policy as it is written.

Now, under that state of the pleadings, what does it matter whether Mr. Mikelsen or Mr. Hanney or Mr. Vohl relied upon anything that Mr. Wheelock had to say, believed what Mr. Wheelock had to say, or didn't believe him? What difference does it make?

They are saying, "We have a written contract with you. You owe us money under it."

There is no question, no issue of reliance, no

(Testimony of Hans Mikelsen.)

issue [230] of right to rely, and no issue of damages because of reliance that can possibly be dragged into this case.

The Court: Is the reliance of the party conduct of the party? It is competent, according to the Plaintiffs' contention, as I understand, to produce testimony as to the conduct of the Plaintiffs as bearing upon their interpretation.

Mr. Stafford: Now, if your Honor please, the only response that I can make to that suggestion is this: When the parties bring a suit on a contract as written, they are in effect, inevitable effect, affirming that that contract constitutes a binding agreement upon which they have a right to recover.

Now, the only question which Mr. Maloy has contended for in this case, which your Honor has found exists, and which we have consistently denied exists in this matter, is the question of the intent of the parties as expressed in describing the subject matter of this insurance. That is not my statement of the only issue; that is Mr. Maloy's statement.

Now, the normal manner of arriving at the intention of the parties to a written agreement is to look at the agreement and give the words used their ordinary meaning, the meaning that they would have to an ordinary man.

That failing, and an ambiguity shown, parol evidence becomes admissible, solely for the purpose of

(Testimony of Hans Mikelsen.)

explaining the ambiguity, not of adding to or extending the intent.

Now, we have Mr. Maloy offering—ostensibly I must look at it this way—he is offering it, as I imagine he is offering all of his evidence, as explanatory of this [231] ambiguity; and what does he offer? He offers a psychological reaction of Mr. Mikelsen, completely secret, and entirely unilateral, as evidencing what? As evidencing the bilateral intent of two parties to a written agreement.

The Court: Do you think it would be proper to ask the Examiner to ask this witness if he procured any other insurance during the time that this policy was—

Mr. Stafford (Interrupting): I think it would be highly improper. What difference does it make whether he procured other insurance? We don't know whether it has been their habit of insuring. I don't see how any act, unilaterally done—in other words, not done by both parties here—it is true, where parol evidence is properly admissible, prior negotiations between the parties are quite regularly admitted in evidence.

I know of no case and Mr. Maloy has not yet produced any here, which says that how one of the parties felt about it is admissible to show what the intent of both parties was. I haven't seen such a case, and that is what he is asking here. "Did you rely on Mr. Wheelock?"

The Court: I will hear from you, Mr. Maloy.

(Testimony of Hans Mikelsen.)

Mr. Maloy: I think that the witness' belief or understanding here as to what property the policy covered, whether it covered this property in Locker 325, is admissible as part of the surrounding circumstances; and the only way you can arrive at that belief is from the reading of the policy, plus what Mr. Wheelock told him.

The Court: Do you contend that your question calls for his statement of a fact or a condition, rather than [232] a state of the witness' mind?

Mr. Maloy: I think both would be admissible, your Honor, in any event; and I think, in response to your inquiry, we would be able to prove—or, rather, it would be admissible to prove whether they took out other insurance, and why they didn't would be admissible.

The Court: Was there anything else you wished to say now?

Mr. Stafford: No, if your Honor please.

The Court: The Court is of the opinion that this objection should be overruled and that the witness should be permitted to answer this question.

Bring in the jury.

(Whereupon, the jury returned to the jury box, and within their presence and within their hearing the following proceedings were had:)

The Court: All of the jurors have returned to their places as before. Do you have the question in mind? [233]

The Witness: Yes.

(Testimony of Hans Mikelsen.)

The Court: I think, as a reminder to the jury, the question should be read.

Mr. Maloy: I think the question should be read, your Honor.

(Whereupon the last question was read by the reporter.)

Mr. Stafford: The objection has already been made.

The Court: And the ruling thereon, which will stand.

Q. (Mr. Maloy): Go ahead and answer the question.

A. Yes, I believed him.

Q. Did you or your partners procure any other insurance on the material and equipment which was stored in Locker 325 during the time it was stored there? A. No.

Mr. Stafford: Just a moment, Mr. Mikelsen. I object to that as having no bearing whatever on any question properly the subject of investigation in this trial, and is a clear and distinct violation of the parol evidence rule, and is incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Q. (Mr. Maloy): I believe you have already answered the question, haven't you?

A. Yes.

Q. Mr. Mikelsen, there is another detail that I omitted asking you about. When you and Mr. Wheelock were discussing the policy in August, 1941, was there any discussion about the engine?

(Testimony of Hans Mikelsen.)

A. Yes.

Mr. Stafford: Just a moment. The same objection.

The Court: Overruled.

Q. (Mr. Maloy): Where were you purchasing the engine for Hull No. 20?

A. From Washington Iron Works.

Q. And where is that? In Seattle?

A. In Seattle.

Q. Was there any discussion as to whether or not this policy would cover this engine?

A. Yes. When the machine left the factory, it was covered.

Q. That is, when it left the Washington Iron Works? A. Yes.

Q. I am not quite clear on that. You said when it left the factory it was covered?

A. Yes.

Mr. Stafford: The same objection, if your Honor please.

The Court: I want to know if he is stating what somebody said or what he said.

Mr. Maloy: That is what I want to know. That is what I am trying to clear up, your Honor.

Q. (Mr. Maloy): Who stated that it was covered? A. Wheelock.

The Court: The objection as applied to this last is overruled.

Mr. Stafford: I want the objection noted, however, the same objection.

The Court: That is what the court thought.

(Testimony of Hans Mikelsen.)

Mr. Stafford: That is right. [235]

The Court: And so it is noted and overruled.

Mr. Maloy: I think that is all. You may cross examine.

Cross Examination

By Mr. Stafford:

Q. You fished the boat that Peterson built for you in the summer of 1942, didn't you, Mr. Mikelsen? A. Yes, sir.

Q. And you put aboard her similar equipment to that that was burned up in the fire, didn't you?

A. Yes.

Q. You bought it in between the time of the fire and the time you went fishing, didn't you?

A. That is right.

Q. So it wasn't so scarce that it wasn't available, was it?

A. Well, we run from one store to another and picked up pieces here and there.

Q. But you got it? A. Yes, we got it.

Q. That is right; and you heard Mr. Vohl testify that you paid \$12,000 for it brand new?

A. Yes.

Q. Is that true? A. That is right.

Q. Then why is it that you ask for \$14,160 in this lawsuit?

A. Well, it didn't cost that much then as it does now.

Q. Oh, I see. In spite of the fact that you replaced it for \$12,000 brand new, you are still go-

(Testimony of Hans Mikelsen.)

ing according to the current market, and now it is worth \$14,160, is that [236] it?

A. No.

Q. What is it worth now?

A. Well, it is worth between twelve and fourteen thousand dollars.

Q. But it is a fact that you people replaced this stuff for \$12,000 with brand new material, and what you replaced it with was all of American manufacture, wasn't it? A. That is right.

Q. And it was superior to the Japanese-manufactured stuff that you had bought from Stakset, wasn't it? A. That is right.

Q. And the whole thing had cost you \$12,000?

A. Well, I haven't gone over it so close.

Q. Well, you heard Vohl testify, and you yourself have testified that you paid \$12,000 for it, and so you sue us for \$14,160. Now, I am asking you why?

A. Well, that is what we thought it cost us.

Q. But you have just said it cost you \$12,000.

A. Just the netting cost \$12,000, but a lot of other things.

Q. Oh, I see. Now, you paid \$4,000 for all this stuff? A. That is right.

Mr. Stafford: I have no other questions.

Redirect Examination

By Mr. Maloy:

Q. Just a minute, Mr. Mikelsen. I intended to inquire, did you replace all of the property that is

(Testimony of Hans Mikelsen.)

described and listed in the inventory that you and Mr. Stakset made up? [237]

A. Most of it.

Q. Most of it? Was there any substantial part of it that you didn't replace?

A. Yes. We couldn't get manila rope. That is one thing.

Q. You couldn't get any manila rope?

A. That is one thing.

Q. Do you think of any other items that you couldn't get?

A. We couldn't get any Norwegian cable.

Q. You couldn't get any what?

A. Norwegian cable, purse line.

Q. You couldn't get any Norwegian cable? That is what they describe as purse wire, isn't it, in the list? A. That is right.

Q. Do you think of any other items that you didn't replace? A. No.

Mr. Maloy: I think that is all.

Recross Examination

By Mr. Stafford:

Q. What did you use in place of manila rope?

A. Sisal, what they call sisal.

Q. Sisal?

A. Yes. It is about 60 per cent.

Q. You didn't use any galvanized wire?

A. Yes, we did.

Q. You bought galvanized wire, didn't you?

A. Yes.

(Testimony of Hans Mikelsen.)

Q. That is better than manila rope for that job, isn't it?

A. Well, things that you can't use rope for, you have to use wire. [238]

Q. Yes, and things that you do use rope for you can also use wire for? A. No, you can't.

Q. You did in this case, didn't you?

A. No.

Q. You didn't replace any of the manila rope with galvanized wire? A. No, we didn't.

Q. I thought you just got through saying you did? A. No, we didn't.

Mr. Stafford: I have no other questions.

Redirect Examination

By Mr. Maloy:

Q. Now, this sisal rope that you speak of, is it as good as manila rope? A. No.

Q. Does it cost as much? A. Yes.

Q. Why did it cost as much as manila rope?

A. Well, on account of the war. Everything went up.

Q. The scarcity of it? A. That is right.

Q. Is it as good as manila rope? A. No.

Q. Well, how much inferior is it? Is it half as good or a third as good or two-thirds as good, or what? A. Oh, about 75 percent.

Q. About 70 percent as good as manila rope?

A. Yes. [239]

Mr. Maloy: That is all.

Mr. Stafford: I have no other questions.

(Testimony of Hans Mikelsen.)

The Court: What are some of the characteristics of manila rope that are superior to the similar characteristics of sisal rope?

The Witness: Well, manila rope would last twice as long as this war rope, what they call sisal.

The Court: It will? Is the manila rope easier to handle?

The Witness: Much easier to handle.

The Court: More flexible?

The Witness: Yes, much easier.

The Court: Is it stronger or less strong?

The Witness: Much stronger.

The Court: Where do they get the sisal material from, the raw material?

The Witness: Well, I couldn't explain that, but I think some of these gentlemen back here could explain that.

The Court: Very well. You may be excused.

Mr. Maloy: That is all, Mr. Mikelsen.

(Witness excused.)

The Court: All are present. You may proceed.

Mr. Maloy: I will call Mr. Smith.

BEN SMITH,

called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Would you please state your name?

A. My name is Ben Smith.

Q. You live here in Seattle?

A. I do.

Q. What is your business at the present time, Mr. Smith?

A. I am in the ship chandlery business, outfitting boats and fishing vessels.

Q. With what concern are you connected?

A. I am assistant treasurer of the Fisheries Supply Company.

Q. What is the business of the Fisheries Supply Company?

A. The ship chandlery business and outfitting small boats.

Q. Perhaps the jury doesn't know what ship chandlery business means. Will you explain what ship chandlery is?

A. Ship chandlery is the general outfitting of boats and ships, steamships and fishing boats, of all their gear, cordage and netting, foodstuffs—a complete line of ships' requirements.

Q. How long have you been engaged in such business?

A. A little over eight years.

Q. In the city of Seattle?

(Testimony of Ben Smith.)

A. In Seattle, with this same company. [257]

Q. Are you familiar with the values of fishing gear and webbing generally?

A. Yes, I am.

Q. And were you so advised on February 24, 1942? A. Yes.

Q. During this period of time that you have been engaged with the Fisheries Supply Company, have you been selling webbing and miscellaneous fishing gear? A. I have.

Q. I will ask that you be handed Plaintiff's Exhibit 2. I would like to have you look that list over, Mr. Smith. Have you been furnished a list of that property so that you could check and look over the values and so forth? A. Yes, I have.

Q. Now, Mr. Smith, have you been in the business of buying and selling, or particularly dealing in fishing gear and equipment of the same type and character during your time with the Fisheries Supply Company as described in Plaintiffs' Exhibit 2? A. I have.

Q. Was there any market value on February 24, 1942 of fishing gear and equipment similar to that of the type described in Plaintiffs' Exhibit 2?

A. Yes, sir.

Q. On February 24, 1942?

A. Yes, sir; there was a market.

Q. Will you tell us what the replacement cost of the list of equipment which is specified and described in Plaintiffs' Exhibit 2 was on February 24, 1942?

(Testimony of Ben Smith.)

A. Well, I figured about \$13,500. [258]

Q. Can you give us an opinion as to its depreciated value or second-hand value, assuming all of such equipment described in Plaintiff's Exhibit 2 was in good condition and had been replaced and kept in good condition, and was in such on February 24, 1942?

A. I would say that that would be about 20% under the replacement value.

Q. 20% under \$13,500? A. Yes.

Q. What amount? Have you computed that?

A. It would be about ten thousand some odd.

Q. Ten thousand some odd? A. Yes.

Mr. Maloy: I think you may examine.

Cross Examination

By Mr. Stafford:

Q. Now, Mr. Smith, you say you have been in the business of buying and selling equipment like this? A. That is right.

Q. Did you ever see Stakset's stuff?

A. I have not seen his merchandise, no.

Q. I can't hear you.

A. I did not.

Q. Do you know anything about it at all?

A. Except from the evidence I have heard here today.

Q. Have you ever bought any used stuff.

A. I have not bought used stuff.

Q. The fact is, you have never bought much of any stuff ex- [259] cept brand new stuff, have you?

(Testimony of Ben Smith.)

A. We deal in boats a lot. They are used.

Q. No, I mean equipment like on Plaintiffs' Exhibit 2.

A. Very seldom. We normally sell new merchandise.

Q. You yourself have never bought any second-hand stuff like this, have you?

A. I have bought second-hand stuff, yes.

Q. Like on that list?

A. Netting, cotton netting.

Q. Cotton netting, but have you ever bought the other items on that list second-hand?

A. There are some items I have, yes.

Q. What is the normal life of a seine, Mr. Smith?

A. The normal life of a seine is a hard thing to determine.

Q. Precisely. You would have to know the particular seine, wouldn't you?

A. A seine that is in good shape and kept up in good shape depreciates in the manner in which I just stated.

Q. How is that?

A. About 20% over new.

Q. In what period of time will it depreciate 20%?

A. Approximately in one year's use.

Q. All right. Now, suppose you have got three years' use. Is it 60%?

A. Not the seine as such. That particular piece of netting might be.

(Testimony of Ben Smith.)

Q. Well, then you couldn't tell, could you, what the value of this stuff was without having seen it?

A. I could not actually tell, but I can go by the evidence of the condition. [260]

Q. All right. Now, precisely what evidence are you going by when you say this was worth \$10,000?

A. The testimony of the previous witnesses as to its general condition.

Q. Precisely what testimony?

A. Of Mr. Stakset and his statement.

Q. Well, I mean the testimony. Not the parties who gave it. What factors are you considering when you say that that stuff, when it burned up, then had a cash market value of \$10,000?

A. They said it was in good condition, and that is—

Q. (Interrupting): That is all you are going by?

A. That is the normal condition of a fishing net.

Q. And that is all you are going by, is it?

A. That is all that you can go by.

Q. And you are excluding the fact that that net was bought in 1937, and was originally Japanese net, aren't you?

A. Would you state that over again?

Q. You are excluding from your computation the fact that this seine was bought originally in 1937 and was a Japanese net, aren't you?

A. I want to know the condition of the net in '42, not '37.

(Testimony of Ben Smith.)

Q. Now, I would like to ask you to answer my question, Mr. Smith. You and I each have different functions in this trial. I am asking you if you did exclude in your figuring the fact that this was a Japanese net and was bought in 1937. Did you figure that when you figured that this was worth \$10,000?

A. I did not figure it as a Japanese net.

Q. Did you figure, Mr. Smith, in arriving at your computation, [261] that Mr. Stakset paid between seven and eight thousand dollars for everything there is listed on Plaintiffs' Exhibit 2?

A. I did not take into consideration his actual cost.

Q. All right. Don't you think that should be taken into consideration, that he bought it new for between seven and eight thousand dollars, in 1937, '38 and '39—that was the new price—and in 1942 it was obviously older than when he bought it. Can you still say it is worth more than \$10,000?

A. Yes, you can.

Q. How?

A. Because it is not as old as you say it is, because that net has been replaced from time to time.

Q. When was the last replacement made in that?

A. I can't say that. I don't know.

Q. Well, if you don't know, how can you say it was made, then?

A. Because they maintained their net, according to their testimony, and replaced it from Cincotta

(Testimony of Ben Smith.)

Brothers and different houses around, so that that net should have been in replaceable condition.

Q. Mr. Smith, you have already admitted that you don't know at all when the last replacement was made in this web?

A. I do not know that.

Q. You have already admitted that you excluded from your computation or figuring the fact that this was a Japanese seine purchased in 1937?

A. That is true.

Q. You have already admitted that you excluded from your [262] figuring the fact that Stak-set paid between seven and eight thousand dollars for all that stuff new? That is right, is it?

A. I don't know a thing about that. What he paid for the net I do not know.

Mr. Stafford: I haven't any more questions.

Redirect Examination

By Mr. Maloy:

Q. I would like to ask you, Mr. Smith, whether during the fall of 1941 and the early part of the year '42 there was any increase in the price of fishing gear and equipment such as described in Plaintiffs' Exhibit 2?

A. If you will pardon me, will that be Japanese netting or American netting?

Q. No, just as it is described there.

A. Well, there has been no increase in price of standard American netting, no.

Q. Since what time? February 24, 1942?

(Testimony of Ben Smith.)

A. No, there has been no increase in cotton netting prices.

Q. In fact, there was a ceiling price put on it, wasn't there, at that time? A. That is true.

Q. The price is the same now as it was then?

A. That is right.

Q. But prior to February 1942, and during the summer and fall of 1941, was there any scarcity or any reason for any scarcity in obtaining such materials?

A. Yes, there was; great scarcity. [263]

Q. What was that due to?

A. Due to the war effort; Lend-Lease.

Q. Are you assuming in your answers to the questions that you have answered that this net was replaced from year to year and kept in good condition and was in good condition on February 24, 1942?

A. Yes, I assumed it was in good condition and replaced.

Q. Now, I figured out—you said that \$13,500 you figured was the replacement value of the property described in Plaintiffs' Exhibit 2, and you figured 20% depreciation. I figured that to be, then—that your valuation would be \$10,800. Have you figured that out?

A. That is pretty close.

Q. Well, will you figure it and see if that is what it is so we can have it in the record?

A. Yes.

(Testimony of Ben Smith.)

Q. 20% from \$13,500? A. \$10,800.

Q. Is that the value you desire to place upon that property described in Plaintiff's Exhibit 2?

A. Yes.

Q. On February 24, 1942? A. Yes.

Mr. Maloy: That is all.

Recross Examination

By Mr. Stafford:

Q. I take it then, Mr. Smith, that you regard the original purchase price, the age and the selling price second-hand [264] as immaterial in arriving at the value?

A. That is right.

Mr. Stafford: I have no more questions.

Mr. Maloy: That is all, Mr. Smith.

The Court: Step down.

(Witness excused.)

Mr. Maloy: The Plaintiffs rest, your Honor.

The Court: Plaintiffs rest. [265]

The Court: Call your next witness.

Mr. Stafford: Mr. Wheelock, would you take the stand?

KENNETH H. WHEELOCK,

called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stafford:

Q. Would you state your name, please, Mr. Wheelock? A. Kenneth H. Wheelock.

Q. What is your business, Mr. Wheelock?

A. I am a local agent in the general insurance business.

Q. With what firm are you connected?

A. It was formerly the Chester J. Chastek Company. About two years ago it was changed over to Chastek & Wheelock.

Q. About how long ago?

A. Approximately 2 years ago.

Q. And that is the name of the firm now?

A. That is correct.

Q. During the month of May, 1941—you heard Mr. Landon testify just now? A. Yes.

Q. Were you introduced to Mr. Hanney during or about that time by Mr. Landon?

A. Yes, I was.

Q. Handing you Defendant's Exhibit A-2, I will ask you to state if you received that letter from Mr. Landon? A. Yes, I did. [271]

Q. And the enclosure attached to it?

A. Yes, sir.

Q. When did you receive that, if you can recall?

A. Well, our office date stamp is on here, May 16, 1941.

(Testimony of Kenneth H. Wheelock.)

Q. Now, about that time did you obtain an order from Mr. Hanney for a bond?

A. About that time, yes. I couldn't state definitely.

Q. What was that bond?

A. That was a performance bond, guaranteeing the performance of a contract entered into between Mr. Hanney and Mr. Peterson of the Marine View Boatbuilding Company for the construction of a fishing boat.

Q. Is that a copy of the contract attached as part of Defendant's Exhibit A-2?

A. Yes, it is.

Q. And was that the contract which formed the basis of the bond which you obtained for Mr. Hanney? A. That is correct.

Q. Or for Mr. Peterson. I don't know which you obtained it for. Now, did Mr. Hanney give you the order for the Builder's Risk Insurance under that contract also? A. Yes, he did.

Q. Have you a recollection as to when he told you that you could have that business?

A. Well, I couldn't set the date. The first time that I met Mr. Hanney was in Mr. Landon's office, at which time we discussed only the performance bond and the terms of this contract for the construction of the boat. It was probably, I would say, during the month of May, perhaps about maybe three or four days after this, that I discussed [272] with Mr. Hanney the subject of Builder's Risk Insurance on the boat, and I believe I told him at

(Testimony of Kenneth H. Wheelock.)

that time that that would be a requirement of the surety company, that coverage be furnished during the construction.

Q. And it was in the contract also?

Mr. Maloy: I will object to that as not the best evidence.

The Court: Objection sustained.

Q. (Mr. Stafford): Now, I do not get it straight, Mr. Wheelock, as to whether you fixed the time when you got the order for the Builder's Risk?

A. I don't know as I fixed the time. To the best of my knowledge and belief the actual authorization was given to me perhaps a week after we originally discussed it. I would say possibly the latter part of May.

Q. And the policy was written in August?

A. That is correct.

Q. Why was there the time between the time you got the order and the time it was written?

A. The reason for that, I don't know just how I should explain it, but a performance bond—

Q. (Interrupting): Why wasn't it written? Why wasn't it written when he gave you the order for it?

A. Because construction had not started on the boat, and we would merely be building up an excessive premium where there would be no coverage afforded because there was no construction. The keel had not been laid.

(Testimony of Kenneth H. Wheelock.)

Q. So that the reason it was issued in August was because the keel was laid in August?

A. That is correct. [273]

Q. All right. Now, Mr. Wheelock, you were in court here, I believe, yesterday, when Mr. Mikelsen testified that on August 20, 1941, he had—I have forgotten who else—I thought he said he and Mr. Hanney went to your office and talked to you about some material they were buying from Stakset. Did you at any time, between the time you first met Hanney through Mr. Landon in May of 1941, from that time until after February 24, 1942, ever have any talks with Mr. Hanney, Mr. Mikelsen, Mr. Vohl or any combination of them, or any individual among them, regarding their purchase and insurance of equipment from Henry Stakset which was stored in the Seattle Salmon Bay Terminal, Locker 325?

A. No. I have no recollection of any such conversation at any time with reference to the things that I have heard here in the last two days.

Q. Can you state whether those conversations ever took place?

A. Not pertaining to any of that material that I have heard discussed.

Q. Pardon me?

A. Not pertaining to any of that material.

Q. That is what I mean.

A. I have had conversations with them.

Q. Oh, I didn't mean that. I mean did you have any conversation with any of the Plaintiffs—Han-

(Testimony of Kenneth H. Wheelock.)

ney, Vohl or Mikelsen,—regarding the equipment that is listed in Plaintiffs' Exhibit 2 now in evidence in this case, and generally referred to in this trial as the Henry Stakset equipment?

A. To the best of my knowledge, no.

Q. During the month of February, 1942, and after February 24, [274] 1942, did Mikelsen come to your office and tell you that this material—and by "this material", I mean the material listed in Plaintiffs' Exhibit 2—had burned up in the fire at Salmon Bay Terminal on February 24, 1942, and that he wanted his money under this policy?

A. The records in my office—

Mr. Maloy: (Interrupting): I object to the records in your office.

Q. (Mr. Stafford): No; did he do it?

A. No, sir.

Q. Did he come in and talk to you about it?

A. No, sir.

Q. Did he ever come in and talk to you about it right up until today? A. No, sir.

Q. Did he ever tell you?

A. About that loss, you mean?

Q. About that loss? A. No, sir.

Q. Now, during the month of March, 1942, Mr. Wheelock, what women were employed in your office?

A. I had one young lady whose name at that time was Russnak, now I believe Paulsen, was working full time during that period; and Mrs.

(Testimony of Kenneth H. Wheelock.)

Wheelock was helping us out and working part-time.

Mr. Stafford: If the Court please, I should like at this time to ask when the Court expects to adjourn?

The Court: I expected to adjourn about 5:00. If you are ill, Mr. Stafford, I will be very glad to consider your request. [275]

Mr. Stafford: No, I hadn't that in mind. I was thinking of calling this young lady up. She is down in the Central Building working for West Construction.

The Court: I would like to proceed until about 5:00 today.

Q. (Mr. Stafford): No other women were employed in your office during the month of March, 1942, then? A. No, sir.

Q. Handing you Plaintiffs' Exhibit 1, Mr. Wheelock, I shall ask you to state what this is.

A. This is a Builder's Risk Policy, Form 50 as amended, to Peter Peterson, dba Marine View Boatbuilding Company, Builder, and Oluf B. Hanney, Owner.

Q. That is the policy which you issued or obtained for Mr. Hanney, which you have generally described earlier in your testimony as the Builder's Risk insurance under this contract?

A. That is the policy.

Mr. Stafford: You may cross examine. I may have one or two questions on direct. I don't think

(Testimony of Kenneth H. Wheelock.)

I shall, but I am just trying to save time by going ahead this way.

The Court: Counsel may cross examine.

Cross Examination

By Mr. Maloy:

Q. Mr. Wheelock, I believe you said that you never saw Mr. Mikelsen or Mr. Hanney or Mr. Vohl or any of them in connection with the obtaining of this policy or the issuing of this policy?

A. I don't know that I said that. [276]

Mr. Stafford: I don't recall any such testimony, if your Honor please.

Q. (Mr. Maloy): Well, did you see Mr. Hanney or Mr. Mikelsen or Mr. Vohl between May and August, 1941 in connection with the issuance of this policy which is Plaintiffs' Exhibit 1?

A. I saw Mr. Hanney on a number of occasions during that period.

Q. Prior to the issuance of the policy, and on or about August 20, 1941, did you have a conversation or any conversation with Mr. Hanney in connection with the issuance of the policy and the coverage of the policy?

A. Not in connection with the issuance of the policy.

Q. In connection with what, then?

A. The coverage afforded under the policy.

Q. Did you have any conversation at or about August 20, 1941, relative to the coverage of the policy, with Mr. Mikelsen?

(Testimony of Kenneth H. Wheelock.)

A. I wouldn't be able to fix the date. I do know that on at least one occasion Mr. Mikelsen was in the office with Mr. Hanney.

Q. Was Mr. Mikelsen in the office with Mr. Hanney on or about August 20, 1941?

A. I wouldn't be able to set the date. I can say this, that to the best of my recollection I met Mr. Mikelsen once prior to the time that Mr. Hanney received the policy.

Q. And was that when they were negotiating with you relative to the issuance of the policy?

A. Mr. Hanney did all of the negotiating with me.

Q. Mr. Mikelsen, I take it, was never present then when there were any negotiations or discussions concerning the coverage [277] of the policy?

A. Oh, yes, Mr. Mikelsen was present at one time, once with Mr. Hanney.

Q. When was that, now?

A. I wouldn't be able to set the date.

Q. Well, was it in August, 1941?

A. It was prior to the issuing of the policy. I do remember that.

Q. Well, then, on that occasion you discussed the coverage afforded by the policy which you were going to issue, didn't you? A. Yes, sir.

Q. And they inquired of you as to what property would be covered by the issuance of the policy which you were contemplating selling them?

A. The order had been given about two months prior to that, sir.

(Testimony of Kenneth H. Wheelock.)

Q. Yes, I understand; but you did discuss the coverage with them, didn't you? A. Yes.

Q. In that conversation you say you discussed the coverage with them. Did you have the form of a policy with you at the time?

Mr. Stafford: Now, if your Honor please, I object to that as not proper cross examination; but more particularly, for the same reason that I have given in other objections to any parol evidence to vary or extend the terms of this policy.

The Court: The objection is overruled.

Q. (Mr. Maloy): Have you the question in mind, Mr. Wheelock? [278]

A. Did I have a copy? Is that the question?

Q. Yes, of the policy which you were contemplating issuing to them? A. I had—

Q. (Interrupting): Did you have Builder's Risk Form No. 50, as amended?

A. I had the form, yes.

Q. Had it been filled out at that time?

A. It was merely a specimen. It wasn't a policy.

Q. But it was the same form as the Builder's Risk Form No. 50 that was ultimately issued?

A. That is correct.

Q. Wasn't it? A. Yes, sir.

Q. And they asked you as to the coverage, and particularly, among other things, as to the engine which they were going to bring from the Washington Iron Works, didn't they? A. Yes.

Q. And that engine was to be shipped from

(Testimony of Kenneth H. Wheelock.)

Seattle to Tacoma when completed, or when the boat was ready for it?

A. Yes, that is correct.

Q. Did they ask you to the coverage afforded by the policy pertaining to the engine?

A. Yes.

Q. What did you tell them? Did you tell them whether it would be covered or not?

A. If I may be permitted, the engine was not to be ready—or the boat was not to be ready for the engine for approximately three months. The contract called for the construction of the hull, together with the engine, \$15,000 [279] being the cost of the hull, and \$15,000 on the engine. In order to have the insureds money, the policy originally was written for \$15,000, which was the cost of the hull; and then the engine in the amount of \$15,000 was to be added at the time it was to be shipped from the Washington Iron Works to Tacoma, and it was during that period that questions arose as to the coverage. I remember one clearly because, while Mr. Hanney was in the office, I 'phoned the Franklin Fire and asked if the engine should be dropped while being unloaded at the boatbuilding company, would the policy cover; and it was during that period that I read the insuring agreements which have been referred to during this trial.

Q. I am asking you, Mr. Wheelock, whether you had any conversation in August with Mr. Hanney and Mr. Mikelsen relative to the coverage of this

(Testimony of Kenneth H. Wheelock.)

policy on the engine which they were going to purchase from the Washington Iron Works?

A. Yes, sir.

Q. Did you read to them certain clauses of the policy? A. I did.

Q. Will you kindly take Plaintiffs' Exhibit 1 and read to the jury the clauses that you read to them? What is the first clause that you read to them?

A. (Reading): "This insurance is also to cover all risks, including fire, while under construction and/or fitting out, including materials in buildings, workshops, yards and docks of the assured, or on quays, pontoons, rafts and so forth, and all risks while in transit to and from the works and/or the vessel wherever she may be lying, [280] also all risks of loss or damage through collapse of supports or ways from any cause whatever, and all risks of launching and breakage of the ways."

That is one clause.

Q. Now, what is the next clause that you read to them in this discussion?

A. The clause pertaining to trial trips, which was later eliminated by endorsement, but the clause reads: (Reading) "This insurance is also to cover all risks of trial trips, loaded or otherwise, as often as required, and all risks while proceeding to and returning from the trial course, but warranted that all trips shall be carried out within a distance by water of 100 nautical miles of place

(Testimony of Kenneth H. Wheelock.)
of construction, or held covered at a rate to be arranged."

Q. Was there any other clause that you read to them at that time?

A. I think that that was all. The first clause is the actual insuring agreement.

Q. The first clause that you just read a few moments ago? A. Yes, sir.

Q. I will ask you, Mr. Wheelock, whether or not you read—

Mr. Maloy: May I approach the witness?

The Court: Yes, you may.

Q. (Mr. Maloy, continuing): Whether you read this clause that you—this clause that you first read here, it is right under the heading of Clauses for Builder's Risk, isn't it? A. Yes.

Q. It is the first clause? A. Yes. [281]

Q. And that is about halfway down the policy, isn't it?

A. Well, it is the first clause under the Clauses for Builder's Risk on the form, you mean?

Q. Yes.

A. It is about halfway down the form.

Q. Yes. Now, you didn't read anything on this policy to them above this clause which you first read here, which is directly under Clauses for Builder's Risk?

A. I don't recall that I did, because this is the pertinent answer to the question of coverage.

Q. The rest of it is all in the policy, isn't it?

A. Oh, yes.

(Testimony of Kenneth H. Wheelock.)

Q. Well, did you read this clause to them above, "On hull, tackle, apparel, ordnance, munitions, artillery, engines, boilers, machinery, appurtenances and so forth, including plans, patterns, molds and so forth, boats and other furniture and fixtures, and all material belonging and destined for Halibut Boat Hull No. 20, building at Brown's Point, Tacoma, Washington, as per clauses hereinbelow specified"? Did you read that to them?

A. Well, I couldn't have read "Halibut Boat Hull No. 20, Brown's Point" because—

Q. (Interrupting): Well, I mean the rest of it.

A. I think probably that I did. It would be unusual—

Q. (Interrupting): It would be natural for you to do so, wouldn't it?

A. It would be the natural thing.

Q. So you think you did read that clause to them also?

A. It would be the natural thing, yes, in trying to explain the coverage afforded under the policy.

[282]

Q. And you read that to them, and at the time you were then discussing the coverage which would be afforded to them under the policy?

A. That is correct.

Q. Now, you also told them that this engine was covered by the insurance as soon as it was shipped from the Washington Iron Works, didn't you, while in transit? A. Yes.

(Testimony of Kenneth H. Wheelock.)

Q. This policy wasn't delivered on August 20, 1941 to Mr. Hanney or anybody else, was it?

A. It wasn't written at that time.

Q. When was it written up?

A. Well, Mr. Moore, of the Franklin Fire, and myself, went to Tacoma—

Q. (Interrupting): Well, I think that is immaterial.

A. (Continuing): —on the 19th—

Q. (Interrupting): Just answer the question, please.

A. I can't tell you when it was written up, sir. The order was placed on the night of the 19th. That is, the order to the insurance company to issue the policy. The keel was to be laid on the morning of August 20th. Now, in the normal course—

Q. (Interrupting): Well, never mind. Just answer the question.

A. Well, I cannot tell you when the policy was received by me.

Q. Can you tell us when you delivered the policy to Mr. Hanney?

A. Not without referring to my correspondence, which you have, or the court has. I wrote a letter to Mr. Hanney. As I recall, my only address of his was in Seattle, and I [283] believe that he was in Alaska at the time I received the policy.

Q. Then you wrote to him, I believe, to ask him the correct address to which to mail the policy, isn't that right?

(Testimony of Kenneth H. Wheelock.)

A. Yes, I think that is correct.

Q. Then, to refresh your recollection, isn't it true that about September 30 or thereabouts you finally mailed the policy to him?

A. I couldn't say without referring to the correspondence.

Q. Well, it was sometime later, wasn't it?

A. It was later.

Q. During this period of time, you knew that Mr. Mikelsen and Mr. Vohl were interested with Mr. Hanney?

A. I don't think that I had ever met Mr. Vohl at that time.

Q. Well, you knew that he had others interested with him?

A. At some time he told me that he did have two other gentlemen who were financially interested in this.

Q. And didn't he tell you—didn't Mr. Hanney tell you, or didn't Mr. Mikelsen, in this meeting, that they were going to acquire some fishing gear and some equipment for this vessel, and were in the process of doing so?

A. No, I have no recollection of anything pertaining to nets and things of that nature. The policy was issued upon the basis of the contract of \$30,000; and anything going into the hull, in the amount of that \$30,000 in that agreement, I explained to them would be covered in accordance with the insuring clauses which I originally read.

Q. And in accordance with the clause which you

(Testimony of Kenneth H. Wheelock.)

said just a moment ago that you undoubtedly read, where it says, "On [284] hull, tackle, apparel" and so forth? A. That is correct.

Q. Now, of course, when the keel was laid, the keel wasn't worth \$15,000, was it? A. No.

Q. But they had \$15,000 of insurance?

A. That is correct.

Q. In other words, the hull—that is, the wooden hull itself wasn't worth \$15,000 until it was completed by the shipyard, isn't that correct?

A. That is correct.

Q. So there was a period of time that elapsed between the time the policy was issued and the time of the completion of the hull when, if only the hull was insured, there was considerable over-insurance, wasn't there?

A. Not necessarily.

Q. Why not?

A. A Builder's Risk policy is designed just for the purpose which you have stated, and the rates are predicated upon the fact that, when the keel is laid, there is not much value.

Mr. Maloy: I move to strike that. I don't care anything about the rates.

Mr. Stafford: Let him answer.

Mr. Maloy: Well, I know, but he can answer the question.

Mr. Stafford: He is answering it. You said, "Why not?" He is answering your question.

The Court: Wait just a moment. Let me hear one at a time. [285]

(Testimony of Kenneth H. Wheelock.)

Mr. Maloy: I am objecting to making a stump speech on the witness stand and running into a lot of stuff about rates. I asked him if it wasn't a fact that, between the time the keel was laid and the hull was insured, if the insurance only covered the hull, there was considerable over-insurance because their insurance was \$15,000.

The Court: And his answer was—

Mr. Stafford: (Interrupting) That is not the question, if your Honor please.

Mr. Maloy: That is the question I want to ask him. I want it answered directly.

Mr. Stafford: If your Honor please, I insist that he be permitted to answer the question that was put.

The Court: If you will wait, I will have it read, and then I will determine it.

Mr. Maloy: I can withdraw the question if I want to. I will withdraw the question and put this question I just propounded.

The Court: You have that privilege.

Mr. Maloy: Now, read the question that I just last propounded.

(Mr. Maloy's statement, "I asked him if it wasn't a fact that, between the time the keel was laid and the hull was insured, if the insurance only covered the hull, there was considerable over-insurance because their insurance was \$15,000" was read by the reporter.)

(Testimony of Kenneth H. Wheelock.)

Q. (Mr. Maloy): That is the question I desire answered.

A. My answer, then, is "No."

Q. Well, the keel and the partially constructed vessel wasn't [286] worth \$15,000, was it?

A. No, sir.

Q. And, of course, I take it and assume, Mr. Wheelock, that you never had any discussion with any of these gentlemen at any time or at all, or with any of them, concerning this policy of insurance covering any fishing gear or equipment or materials while stored in Seattle?

A. To the best of my knowledge, no.

Mr. Maloy: I think that is all. I have Mr. Wheelock's deposition here, but I haven't had a chance to look it over, and I would like to have a chance to look it over. There might be another question or two, but I doubt it.

The Court: Do you wish to redirect as to any matter?

Mr. Stafford: I have no redirect.

The Court: You may be excused from the stand, but would you kindly remain in attendance until excused?

Mr. Maloy: I will do this, your Honor. I am acquainted with Mr. Wheelock, and I will notify Mr. Stafford at nine o'clock tomorrow morning whether he will need to appear here for any further cross examination, so he can be excused unless counsel desires him further.

Mr. Stafford: I would appreciate that, and I am sure Mr. Wheelock would.

(Testimony of Kenneth H. Wheelock.)

Mr. Maloy: I will be glad to do that, to accommodate Mr. Wheelock.

The Court: Counsel for the Plaintiffs has agreed to notify Mr. Stafford by nine o'clock tomorrow morning whether or not your further attendance is desired. Unless [287] your further attendance after today is requested, you will be excused without coming tomorrow. You won't have to come tomorrow unless counsel for the Plaintiffs advises Mr. Stafford that he wishes you here.

(Witness excused.) [288]

The Court: Any rebuttal?

Mr. Maloy: Just a bit. I would like to call Mr. Mikelsen.

The Court: Mr. Mikelsen, come forward. You have already been sworn. You may resume the stand.

HANS MIKELSEN

one of the Plaintiffs, called as a witness in rebuttal, being previously sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Mr. Mikelsen, did you see the young lady that took the witness stand yesterday, Mrs. Paulsen, when she was on the stand? A. Yes.

Q. State whether you have ever seen her before?

A. Yes, that is the girl that were in the office.

(Testimony of Hans Mikelsen.)

Q. What is that?

A. That is the girl that were in the office of Mr. Wheelock.

Q. And when was that?

A. In August, 1941 when I were up there.

Q. Did you see her any other time?

A. I didn't see her any other time.

Mr. Maloy: That is all.

Mr. Stafford: I have no questions.

The Court: You may be excused from the stand.

(Witness excused.)

Mr. Maloy: I will ask Mr. Hanney to take the stand. [300]

The Court: Mr. Hanney, you have already been sworn. You may now resume the stand.

OLUF B. HANNEY

one of the Plaintiffs, called as a witness in rebuttal, being previously duly sworn, testified further as follows:

Direct Examination

By Mr. Maloy:

Q. Mr. Hanney, you heard Mr. Landon's testimony yesterday about his having drafted this contract, the boatbuilding contract for you?

A. Yes.

Q. Did you? A. Yes.

Q. What is the fact? Did he draw it for you or didn't he?

(Testimony of Oluf B. Hanney.)

A. Well, he drawed it for us. The reason why—

Mr. Stafford: (Interrupting) Would you speak up, please, Mr. Hanney?

The Court: We will have the reporter read the answer made.

(Whereupon, the incompletely answered question of the witness was read by the reporter.)

Q. (Mr. Maloy) Go ahead and finish your answer.

A. The reason why was because usually these small yards, they draw their own contract, and we sign them right there; and this time Mr. Landon drawed it for us.

The Court: May I ask what you meant by "we signed it right there"?

The Witness: We signed it at Mr. Peterson's [301] office in Tacoma.

The Court: At the boatbuilding plant?

The Witness: At the boatbuilding plant. Why I didn't remember that is because we have several contracts before, and the yards used to draw their own contracts, them small yards.

Q. (By Mr. Maloy) Did you have another contract in existence where you were having another boat built at the same time? A. No.

Q. You didn't have any other boat that was being built? A. Not at the same time.

Q. Not at the same time? I see.

The Court: Did you understand his answer?

Mr. Maloy: Yes, I did.

(Testimony of Oluf B. Hanney.)

The Court: The rest of his answer?

Mr. Maloy: Yes. That is all.

Cross Examination

By Mr. Stafford:

Q. Now, Mr. Hanney, how many boats have you had built by contractors who provided their own contracts? A. Oh, about four boats.

Q. In the period of how many years?

A. Oh, 14 or 15 years.

Q. And were all of these boats as large as this one? A. Except one.

Mr. Stafford: I have no further questions.

Mr. Maloy: That is all.

The Court: You may be excused.

(Witness excused.) [302]

[Endorsed]: Filed Jan. 13, 1945.

[Endorsed]: No. 10938. United States Circuit Court of Appeals for the Ninth Circuit. The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania, a Corporation, Appellant, vs. Oluf B. Hanney, Hans Mikelsen and Paul Vohl, Appellees. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States States for the Western District of Washington, Northern Division.

Filed Jan. 30, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,938

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees,

vs.

THE FRANKLIN FIRE INSURANCE CO. OF
PHILADELPHIA, PENNSYLVANIA, a
corporation,

Appellant

STIPULATION

It Is Hereby Stipulated by and between appellant and appellees, through their respective counsel, that subject to the approval of the Circuit Court of Appeals the appellant may have up to and inclusive of March 1, 1945, in which to serve and file its opening brief on appeal.

It Is Further Stipulated by and between appellant and appellees, through their respective counsel, that pursuant to the order of the Honorable John Bowen, District Judge, dated November 25, 1944, which order was subsequently confirmed by the Circuit Court of Appeals, directing the appellant to furnish the following portion of the reporter's transcript of record and exhibits:

1. All of the evidence included in the reporter's transcript of the evidence of the following plaintiffs' witnesses, to-wit: Hans Mikelsen, Oluf B. Hanney, H. T. Duren, Paul Vohl, Ben Smith, and

Henry Stakset, including the plaintiffs' Exhibits numbered (1) the insurance policy, (2) the inventory of personal property, (4) letter, Hansen & Rowland, Inc. to Franklin Fire Insurance Co., and (5) letter of Franklin Fire Insurance Co. to Hansen & Rowland, Inc., offered and received in evidence during trial of said cause.

2. All of the evidence in the reporter's transcript of defendant's witness, Kenneth Wheelock, offered and received in evidence during the trial of the said cause.

that the appellant will immediately direct the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to cause to have printed, or print, the above designated and described portion of the reporter's transcript of the evidence and the exhibits above mentioned so that they will be and constitute a supplemental transcript of the record on appeal of the above entitled cause.

Dated this 30th day of January, 1945.

HAYDEN, MERRITT, SUM-
MERS & STAFFORD

By MATTHEW STAFFORD

Attorneys for Appellant

C. E. H. MALOY

Attorneys for Appellees

[Endorsed]: Filed Feb. 2, 1945. Paul P.
O'Brien, Clerk.

